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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956 ⁷

No. ~~819~~ 89

KNUT EINAR HEIKKINEN, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 6, 1957
CERTIORARI GRANTED APRIL 22, 1957

In the
United States Court of Appeals

For the Seventh Circuit

No. 11709

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

KNUT EINAR HELKKINEN,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Wisconsin.

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1 RECORD OF PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN.

At a term of the District Court of the United States for the Western District of Wisconsin, begun and held at the City of Madison, Wisconsin, in said District, on the first Tuesday of December A. D. 1952, and on October 14, 1953, being one of the days of said term proceedings were had as follows:

2 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA,

For the Western District of Wisconsin.

(Filed Nov. 10, 1953. Edgar M. Alstad, Clerk.)

United States of America, }
vs. } No. 8 U. S. C. 156(c)
Knut Einar Heikkinen. }

The Grand Jury charges:

Count One.

1. Defendant, Knut Einar Heikkinen, is an alien who entered the United States at Eastport, Idaho on or about October 1, 1916, from Canada, and against whom an Order of Deportation is outstanding under the provisions of 8 U. S. C. 137, said Order having been entered on or about April 9, 1952 by reason of the said Knut Einar Heikkinen having been found in the United States in violation of said Act of Congress in that the said Knut Einar Heikkinen was, after entry, a member of the following class as set forth in Section 1 of the Act of October 16, 1918, as amended (64 Stat. 1006), to-wit, a member of the Communist Party of the United States, and, pursuant to said Order of Deportation, was required to depart from the United States during the period of six months from April 9, 1952.

2
Indictment.

2. During the period of six months from April 9, 1952, and continuously thereafter, the defendant, Knut Einar Heikkinen, did willfully fail to depart from the United States and during said period and thereafter remained in Superior, Douglas County, within the Western District of Wisconsin.

Count Two.

1. The grand jury realleges all of the allegations of paragraph 1 of Count One of the indictment the same as if the allegations were fully set forth herein.

2. During the period of six months from April 9, 1952 and continuously thereafter, the defendant, Knut Einar Heikkinen, while in the Western District of Wisconsin, did willfully fail to make timely application in good faith for travel or other documents necessary to his departure from the United States.

A True Bill,

Richard E. Ela,
Foreman.

Frank L. (illegible)
United States Attorney.

4 Endorsed: United States District Court. * * (Caption—13,367) * * Indictment—Violation of 8 U. S. C. 156(c) Immigration.

5

(Filed October 31, 1955. Edgar M. Alstad, Clerk.)

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4. Said Count does not show by what authority, or upon or pursuant to what hearing, if any, an Order of Deportation was issued.

5. Said Count does not show that due process was had by the defendant in any hearing accorded to him as a result of which a deportation order was entered.

6. Said Count does not show to what country the defendant was ordered deported.

7. Said Count does not allege that the country to which defendant was ordered deported, if any, would receive said defendant.

8. Said Count does not show that the country to which the defendant was ordered deported, if any, has issued or will issue travel documents to permit defendant's departure from this country.

9. Said Count does not allege either the country of origin of the defendant or the country of which said defendant is, or last was, a citizen, or the country to which he was ordered deported.

10. Said Count alleges an Order of Deportation was entered against the defendant on April 9, 1952, and shows no further action by the government to enforce said Deportation Order, and further shows no action by the Attorney General pursuant to 8 U. S. C. 156 (a), by reason of the lack of which the government is presumed to have waived any right to deport defendant, and therefore, the defendant is not required to depart from the United States.

11. Said Count does not allege that application for travel documents by the defendant would have resulted in the securing of travel documents necessary for the departure of the defendant from the United States.

12. Said Count does not show that the defendant is deportable to any country whatever, or that he could gain admittance to any country.

13. Said Count is defective in that it does not allege in what manner the defendant willfully failed and refused to make timely application in good faith for travel and other documents necessary for his departure from the United States.

14. Said Count is defective for the further reason that Section 8 U. S. C. 156 (c) imposes hardships, penalties, punishment and imprisonment based on the alleged violation of an Order of Deportation outstanding under the provisions of Section 8 U. S. C. 137, in that the defendant, after entering into the United States, has been

Motion to Dismiss Indictment.

a member of the Communist Party of the United States; that the law making past membership in the Communist Party of the United States. (8 U. S. C. 137, as amended) grounds for deportation was not in effect until 1950 and the Order of Deportation against defendant is based on conduct antedating the effective date of said law; said Count is therefore violative of the United States Constitution in that it is an ex post facto law and constitutes a bill of attainder.

15. Said Count is further defective because Section 156(c) aforesaid is violative of due process in that it deprives defendant of his right to a jury trial and the requisite forms of criminal procedure, in that it delegates to an administrative body, or purports to delegate to an administrative body, the determination of the essential elements of an alleged criminal offense, the commission of which subjects the defendant to imprisonment in the penitentiary and deprivation of his liberty.

16. Said Count avers an Order of Deportation, which is a mere administrative proceeding without the protective devices guaranteed to persons accused of a crime, and can not legally form the basis of a criminal prosecution resulting in the denial of liberty.

17. Said Count is further defective in that the defendant was at the time said indictment was filed under parole to the Department of Justice under 8 U. S. C. 156 (b) as amended, an alternative provision of which parole would be violated by defendant's departure from the United States, thereby making the defendant subject to double

9 jeopardy, contrary to the Constitution of the United States, and more particular to the Fifth Amendment thereof.

18. That the entire Act under which this Indictment is brought is unconstitutional in that it violates due process of law and attempts to legislate in the realm of free speech, thought and association, areas reserved to the individual and beyond the scope of legislation by the Federal Government.

19. Said Count is defective in that it does not allege that the defendant is an alien resident in the United States contrary to the law.

20. And in support of his motion to dismiss Count Two of said Indictment, defendant states as a ground in support of said motion that said Count does not charge an offense and that there is no crime averred therein.

21. And in further support of his motion to dismiss Count Two of said Indictment, defendant restates his objections 2 to 19 inclusive, to Count One and asks that they be incorporated in his motion to dismiss Count Two of said Indictment.

Wherefore, the defendant prays this Honorable Court to dismiss the said Indictment on the grounds hereinabove set forth. Dated this 28th day of October, 1955.

Respectfully submitted,

M. Michael Essin,

Attorney for Defendant,

623 North 2nd Street,

Milwaukee 3, Wisconsin,

Broadway 1-8683.

10

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—13,367) * *

NOTICE OF MOTION.

(Filed 10/31/55. Edgar M. Alstad, Clerk.)

To: George E. Rapp, Esq.

United States Attorney for the

Western District of Wisconsin.

Please take notice, that the undersigned will bring the attached motion on for hearing before this court in the Court Room of the United States District Court for the Western District of Wisconsin, at Madison, Wisconsin, on the 8th day of November, 1955, at 9:00 o'clock, in the forenoon of that day, or as soon thereafter as counsel can be heard.

M. Michael Essin,

Attorney for Defendant,

840 Madison Building,

623 North 2nd Street,

Milwaukee 3, Wisconsin,

Broadway 1-8683.

Dated: October 28, 1955.

11

IN THE UNITED STATES DISTRICT COURT.

• • (Caption—13,367) • •

**MOTION, IN THE ALTERNATIVE, FOR AN ORDER
OF THE COURT FIXING THE TIME AND PLACE
FOR PRE-TRIAL DISCOVERY OF DOCUMENTS
PURSUANT TO RULE 17(c) OF THE FEDERAL
RULES OF CRIMINAL PROCEDURE.**

Comes now the defendant, Knut Einar Heikkinen, by his attorney, M. Michael Essin, and shows that he has heretofore caused to be served on George E. Rapp, Esq., United States Attorney for the Western District of Wisconsin, a pre-trial subpoena requiring him to produce before trial, at a time and place to be fixed by this Court, the documents hereinafter mentioned, which said subpoena together with the return thereon is on file in the office of the Clerk of this Court.

The documents called for by said subpoena are therein described as follows:

1. Transcript of the record of the deportation proceedings against the defendant, which proceedings were conducted by the United States Immigration and Naturalization Service of the Department of Justice.

12 2. All records, not heretofore offered in evidence by the government on the prior trial of this cause, including, but not limited to signed statements, made by the defendant at any of his appearances before an officer, employee or agent of the United States Immigration and Naturalization Service, Department of Justice and any transcripts or written memoranda of proceedings of such appearances as were made.

3. All correspondence and records of telephone conversations by officers, employees, and agents of the United States Immigration and Naturalization Service, Department of Justice, or by any representative of the Government of the United States of America with any representatives of any foreign countries relating to the defendant herein and all replies or other communications including records of the telephone conversations received by said officers, employees, and agents of the United States Immigration and Naturalization Service, Department of Justice, or by any representative of the Government of the United

States of America from any representative of foreign countries relating to the defendant herein.

4. All documents, books and papers obtained by Government Counsel in any manner other than by seizure or process: (a) in the course of investigation by the Grand Jury, which resulted in the return of the Indictment herein, and (b) in the course of the Government's preparation for trial in this case, if such books, papers and documents have been presented to the Grand Jury or are to be offered as evidence on the trial under said Indictment, except those of the above which were offered by the government on the prior trial in this cause.

The defendant, having filed a motion for dismissal of the Indictment, in the event said motion is denied, moves this Court to enter an order fixing the time and place 13 for the production of said documents and directing the above-named United States Attorney to make available to the defendant and his attorney reasonable accommodations for the inspection of said documents and for copying or photographing the same.

Further, defendant states that said documents are evidentiary and relevant and are not available to defendant in advance of trial; that defendant can not properly prepare for trial without inspection of said documents; that failure to obtain such inspection may tend unreasonably to delay trial and that this application is made in good faith.

Dated this 28th day of October, 1955.

M. Michaël Essin,
Attorney for Defendant,
623 North 2nd Street,
Milwaukee 3, Wisconsin,
Broadway 1-8683.

14

DISTRICT COURT OF THE UNITED STATES.

* * (Caption—13,367) * *

SUBPOENA TO PRODUCE DOCUMENT OR OBJECT.

(Filed 10/31/55. Edgar M. Alstad, Clerk.)

You are hereby commanded to appear in the District Court of the United States for the Western District of Wisconsin at a time and place to be fixed by this court in the case of United States vs. Knut Einar Heikkinen and bring with you before trial the following: (See reverse side of this Subpoena).

This subpoena is issued upon application of the defendant:

Edgar M. Alstad,

Clerk.

Dated: October 28, 1955.

By

Deputy Clerk.

Return.

Received this subpoena at Madison, Wisconsin on Oct. 31, 1955 and on Oct. 31, 1955 at Madison, Wisconsin served it on the within named George E. Rapp, United States Attorney by delivering a copy to him and tendering to him the fee for one day's attendance allowed by law.

Ray H. Schoonover,

U. S. Marshal.

Dated: Oct. 31, 1955.

By Geo. H. Brown,

Chief Deputy.

Service Fees

Travel.....	\$	
Services.....		.50
Total.....	\$.50

15. 1. Transcript of the record of the deportation proceedings against the defendant, which proceedings were conducted by the United States Immigration and Naturalization Service of the Department of Justice.

1. Insert "United States," or "defendant" as the case may be.

2. All records, not heretofore offered in evidence by the government on the prior trial of this cause, including, but not limited to signed statements, made by the defendant at any of his appearances before an officer, employee or agent of the United States Immigration and Naturalization Service, Department of Justice and any transcripts or written memoranda of proceedings of such appearances as were made.

3. All correspondence and records of telephone conversations by officers, employees and agents of the United States Immigration and Naturalization Service, Department of Justice, or by any representative of the Government of the United States of America with any representatives of any foreign countries relating to the defendant herein and all replies or other communications including records of the telephone conversations received by said officers, employees and agents of the United States Immigration and Naturalization Service, Department of Justice, or by any representative of the Government of the United States of America from any representative of foreign countries relating to the defendant herein.

4. All documents, books and papers obtained by Government Counsel in any manner other than by seizure or process: (a) in the course of investigation by the Grand Jury, which resulted in the return of the Indictment herein, and (b) in the course of the Government's preparation for trial in this case, if such books, papers and documents have been presented to the Grand Jury or are to be offered as evidence on the trial under said Indictment, except those of the above which were offered by the government on the prior trial of this cause.

16

IN THE UNITED STATES DISTRICT COURT.

* * * (Caption—13,367) * * *

(Filed January 19, 1956. Edgar M. Alstad, Clerk.)

STENOGRAPHIC TRANSCRIPT

of proceedings had in the ~~above~~ entitled cause, heard in said Court, sitting in the City of Madison, in said Western District and State of Wisconsin, the Honorable Patrick T. Stone, Judge, presiding; said cause having come on for hearing on Tuesday, the 8th day of November, 1955, at 9:00 o'clock in the forenoon, upon alternative motions heretofore filed by the defendant.

Appearances:

Hon. George E. Rapp, United States Attorney;

Mr. James H. McDermott, Assistant U. S. Attorney;
Attorneys for the plaintiff.

Mr. M. Michael Essin,
Attorney for the defendant.

17 The Clerk: United States versus Knut Heikkinen.

The Court: I have read your brief, Mr. Essin, and I will say to the attorneys now that I have passed upon the question of the validity of the indictment once, and I have found it was valid, and I will so find now; so there is no need to spend any time arguing that. But, on your motion to produce, that is another question.

Mr. Essin: Well, do I understand, then, your Honor, that in this proceeding—

The Court: What is that?

Mr. Essin: I say, do I understand, then, your Honor, that in this proceeding the Court is again finding that the motion for dismissal of the indictment is denied? Is that it?

The Court: Yes. I have already passed upon that once before, and I haven't changed my mind. I am satisfied the indictment is valid, so don't spend any time on that. I am ruling now the indictment is valid, and your motion to dismiss is denied.

But you have other motions with reference to the production of records.

Mr. Essin: Your Honor, I was rather primed for argument on that motion to dismiss the indictment—

The Court: Well, there is no need of wasting 18 my time and your time on something as to which I am satisfied I was right before, and I am right now.

Mr. Essin: Well, under those circumstances, then, your Honor, I had filed three motions; and, of course, the first, as the Court has indicated, that is, the motion to dismiss the indictment is now disposed of.

The other two motions, the motion for pre-trial discovery under Rule 17(c), and the motion for continuance, were in the alternative.

Now, I would like to ask the Court whether, on the two remaining motions—that is the motion for pretrial discovery and for continuance, the Court wants me to argue the first, and then have counsel for the Government argue the first motion, and then come back on the second?

The Court: Well, you can make any argument you wish. What is your motion, now?

Mr. Essin: I have two motions left.

The Court: Yes?

Mr. Essin: One is the motion for pretrial discovery under Rule 17.

The Court: What is it you want to discover? What do you want to see?

Mr. Essin: Well, I would like to—if the Court 19 will give me just a half a moment—

The Court: All right.

Mr. Essin: On our motion for pretrial discovery, your Honor, under the first part—Part 1, or Paragraph 1 of our motion—

The Court: What page is that on?

Mr. Essin: That is on the first page, at the very bottom,—that is after the notice of motion—it would be the second page of the document (indicating).

The Court: Yes, here it is—the second page. All right, what paragraph?

Mr. Essin: That is the paragraph that starts, that is numbered number 1, and runs over from the bottom of that first page on to the top of the second page (indicating).

Now, your Honor, what we are asking for here is the transcript of the record of the deportation proceedings which were conducted by the United States Immigration

and Naturalization Department—or Service; rather, of the Department of Justice.

If I may be permitted, the Court will recall that in prior proceedings in this case, that part of our similar motion for pretrial discovery had been denied.

The Court: I don't have any recollection now, 20 but wasn't there a certified copy of that record offered?

Mr. Essin: No, your Honor. There may be one available.

The Court: Not in the transcript, I mean, but wasn't there a certified copy presented to the Court?

Mr. Essin: No, your Honor. As a matter of fact, the issue was determined by the Seventh Circuit—

The Court: Well, I am sure there was something that I passed upon. What is your recollection on that?

Mr. Rapp: At the time of the trial, your Honor, at Wausau, we presented to the Court the order which, in turn, recited the facts which led up to the order of deportation being entered. That is, the findings of facts by the three-man Appellate Board, and also by the Hearing Officer.

The Court: Yes. I know there was something there, and that that was—

Mr. Rapp: That was the findings of facts and conclusions of law upon which they based their deportation order.

The Court: Yes.

Mr. Essin: May I review—

The Court: We had that before the Court. Now, what else do you want?

21 Mr. Essin: We want to see the record of the deportation proceedings themselves, on which the order which was admitted in the previous trial is based.

Now, what the Court—if I may be permitted to review in some detail the proceedings of the first trial—what the Court saw at that time was the order of deportation. And the—

The Court: And the proceedings upon which it was based.

Mr. Essin: No, your Honor.

Mr. Rapp: If it please the Court, may I make this comment at this time?

We believe—the Government believes that they have a right to withhold this. However, in the interest of as speedy a disposition of this matter as we can possibly get,

we are willing to waive any rights that we may have to them, and produce for him for his inspection the entire transcript of the proceedings that were had before the Immigration and Naturalization authorities, which led up to this order of deportation.

We will voluntarily do that so that we may get this matter disposed of as rapidly as we can.

The Court: All right. That will take care of that.

22 Mr. Essin: Your Honor, in connection with that, I am satisfied that the Government wishes to have me inspect the transcript—

The Court: You can take photostatic copies if you wish.

Mr. Rapp: If it please the Court, I might make this further statement for the record:

That at the outset of this proceeding, Mr. Essin was not representing the defendant; he was represented by Mr. Englander; and we have every reason to believe that Mr. Englander did in fact receive a copy of this entire proceedings—that is, a photostatic copy.

Several years have transpired since this matter was originally brought. They have had all that time, including the time since the trial, since the appeal was heard, to—and, if your Honor will recall, the Immigration and Naturalization authorities do have available, and will make, upon request, photostatic copies for him, which can be purchased by any alien.

Mr. Essin: Your Honor, if I may be permitted to expand on that point:

I do not speak with authority as an attorney who practices before the Immigration and Naturalization Service.

I must state to the Court, however, that I have handled before that Service at least twenty cases in the last few years.

In each case where there was an appeal—now, I am not discussing now the appeal in this case, or any elements of this case—but my related experience before the Immigration and Naturalization Service. In every case where there was an appeal—some of them didn't even go to the court—upon request, a written request to the Immigration Service, the attorney—in those instances, myself, was immediately furnished by the Immigration Service with a copy of all of the entire transcript.

They were furnished with this proviso, which was also accepted—which was also accepted by counsel—and that

was that, upon completion of the appeal, upon final determination of the appeal of whatever deportation case I was presently representing at the time, the transcript must be returned to the agency. I have always abided by that proviso.

The Court: Most likely that is what happened, and your predecessor in title to this position most likely had that.

Mr. Essin: Now, to my knowledge, there have been at least three attorneys—at least three attorneys involved in this matter.

24 The Court: Somewhere along the line, someone got what you have asked for.

Mr. Essin: Yes, and I have reason to believe there was a fourth attorney involved, up in St. Paul, on part of the proceedings. What they saw I don't know. But the point I am stressing now is that ordinarily the Immigration and Naturalization Service, upon request by counsel, furnishes, on a loan basis, a copy of the transcript of the proceedings.

The Court: Well, that is what the Government is ready to furnish you now.

Mr. Rapp: Let me ask him if he has made such a request from the Immigration and Naturalization Service for that copy?

Mr. Essin: I did not, only because I am waiting for an order from this Court, because this Court—

The Court: Well, the Court will give you such an order now, that you may get exactly what you say you got in other cases, the transcript of the proceedings.

Mr. Essin: On a loan basis, that is. I am satisfied with that.

The Court: All right, you may have that.

I am going to set this case down for trial on December 12th, the opening day of our resumed session here.

25 That will give you ample time, and give you a day certain—December 12th at ten o'clock in the forenoon at Madison.

Mr. Rapp: Now, in connection with this deportation proceedings, your Honor, let me advise the Court that I do not have available an extra copy I can let him take out of my office.

Mr. Essin: Well—

The Court: You notify the Immigration Department

today that the Court has directed it to furnish him a transcript of the proceedings.

Mr. Rapp: Yes, sir. I shall do that.

The Court: And copies of the order.

Mr. McDermott: On a loan basis, your Honor?

Mr. Essin: Yes, that is satisfactory to me.

The Court: What is that?

Mr. McDermott: On a loan basis? It is to be loaned?

The Court: On a loan basis.

Mr. Essin: Oh, yes, surely, because, once this proceeding is finished, I have no further need for it.

The Court: All right.

Mr. Essin: Did I understand the Court to say the trial will be on December 12th at 10:00 a. m.?

26 The Court: December 12th at ten o'clock, yes, at Madison.

Mr. Essin: Thank you. At Madison.

Now, may I, your Honor—in reference to this motion which was under discussion—

The Court: Can you point out to the Court those bench marks? I say, have you found those bench marks?

Mr. Essin: Well, I know of one bench mark which the Court, the Seventh Circuit Court itself indicated—

The Court: I think you will have to reverse the Judges to find it.

Mr. Essin: It may well be, your Honor, once I have an opportunity to study that transcript, I may find what bench marks I may suggest to the Court to follow. I don't know—until I see that transcript I am not in a position—

The Court: Yes, all right.

Mr. Essin: Your Honor, in reference to part 2 of this same motion which was under discussion,—

The Court: What is that?

Mr. Essin: That is on page 2—if I may be given just a moment, if I may review—

The Court: Which one is that?

Mr. Essin: If we may review again—Part 1 has
27 been settled by this Court; and Part 2, or section 2, the Court did grant my motion as to part 2 on the prior trial.

Now, what we are asking for is any records in reference to part 2 not heretofore presented by the Government in the prior trial, because we have the record to rely on as to documents previously presented.

The Court: You will have a transcript of all the testimony and all of the evidence upon which the Government made its order of deportation,—that is, all that which you are entitled to.

Mr. Essin: Your Honor, that is not the point that I am making now.

On argument on the motions, or the motion for pretrial discovery prior to the first trial of this matter—I believe the argument was here in Madison?

Mr. McDermott: That is correct.

Mr. Essin: The Court granted part 2 of my motion. However, part 2 now, in this motion, is somewhat differently worded—in this respect:

What part 2 now asks for are any documents not offered by the Government in the first trial.

In other words, if the Government plans to offer additional documents, which it had not offered in the first trial as to part 2, then we would like to have the right to inspect those.

The Court: You will have a right to inspect now, yes.

Mr. Rapp: All documents?

The Court: I doubt if there will be anything in addition. I don't know.

Mr. Rapp: All documents, now, is he referring to? This is that typical fishing expedition, your Honor,—

The Court: I know, but he has an idea in his mind that the Government may have some other documents that they didn't present at the time of the order of deportation proceedings. If they have such documents, and they are going to use them at this trial, then he should have a right to inspect them. Otherwise, not.

Mr. McDermott: That is right.

Mr. Rapp: We have presented everything we intended to use, in the last trial.

Mr. Essin: Oh, well, then that satisfies me, as to part 2.

The Court: That is all you are entitled to.

Mr. Essin: That satisfies me as to part 2.

Now, if I may go on as to part 3:

What we are concerned with there—if my recollection serves me right, the Court in the argument on this motion prior to the first trial, denied part 3. And in this motion we are again asking for part 3, in which

we are asking for correspondence, records of telephone conversations between officers of the I. N. S.—that is, the Immigration and Naturalization Service—and representatives of foreign governments in reference to what efforts the Government has made—or had made, rather, to deport the defendant.

Now, we base our claim to those documents on the opinion of the majority, as expressed by Justice Douglas in the Spector case, *United States v. Spector*, 343 U. S. 164.

Now, in that case the court—

The Court: It wasn't the duty of the Government to help this man out of the country. It was his duty to obey that order, and to get out of the country.

But if the Government has any correspondence that it had with reference to his deportation proceedings—I don't see that that is necessary—

Mr. McDermott: No.

The Court: I don't think so. That order of deportation was made, and it was his duty to move.

Mr. Rapp: It is not evidentiary, your Honor—

Mr. Essin: Please, Mr. Rapp. Your Honor,—

30 The Court: Yes?

Mr. Essin: Now, the argument in the Seventh Circuit on that point, if I may state—and I am refreshing the recollection of both Mr. Rapp and myself—on that point was quite extensive.

Now, I recall—and I repeated that in an informal conference with Mr. Rapp before Court convened this morning—I recall that Judge Finnegan at that time made a pointed question on this very point, your Honor,—

The Court: Judge Finnegan—yes, all right. Go ahead.

Mr. Essin: (Continuing.) —to Mr. Rapp, when Mr. Rapp was arguing the point.

The Court: I don't know anything about that. Let's not—

Mr. Essin: And I am restating it, and Mr. Rapp does not dispute that this occurred—

The Court: Let's confine ourselves to this: whether the order of deportation was valid, and when it was made, and from that time on, that is as far as we will go—the order of deportation, and his failure to obey the order of deportation. That's all we are interested in.

The Government is now opening up its records to you as to the proceedings, and the deportation proceedings,—

Mr. Essin: I understand, then,—

The Court: That is all you are entitled to.

Mr. Essin: (Continuing) —that the Court is granting part 3?

Mr. Rapp: No.

Mr. McDermott: No.

The Court: What is that—part 3, on page 2?

Mr. Essin: On page 2, that is right.

The Court: Paragraph 3? (Examining motion.)

Mr. Essin: Yes.

The Court: (Reading from motion:)

“All correspondence and records of telephone conversations by officers, employees, and agents of the United States Immigration and Naturalization Service, Department of Justice, or by any representative of the Government of the United States of America with any representatives of any foreign countries relating to the defendant herein and all replies or other communications including records of the telephone conversations received by said officers, employees, and agents of the United States Immigration and Naturalization Service, Department of Justice, or by any representative of the Government of the United States”—

That motion is denied.

Mr. Essin: May I argue that point, your Honor?

The Court: No. That motion is denied. That hasn't any bearing upon this case at all.

Mr. Essin: May I—

The Court: I don't care what correspondence the Government had with Finland, or Canada, or anywhere else, with reference to his deportation, after that order was entered. They owed him no duty. It was his duty to obey that order. That is all there is to it.

Mr. Essin: May I argue that point, your Honor, for just a few moments?

The Court: You may argue it, yes, but I don't see—

Mr. Essin: Now, Justice Douglas in the majority opinion there—and I refer to the majority opinion in the recent case of—

The Court: You are entitled to inspect, and you are entitled to use any evidence that is relevant and material.

and I don't believe that is relevant or material. I am familiar with that case you are talking about.

Mr. Essin: May I reemphasize the point made by Justice Douglas?

23 The Court: Yes, go ahead.

Mr. Essin: He says there are two elements—I am paraphrasing his opinion on this point—Justice Douglas says there are two elements in reference to a deportation: the country from which he is to go, and the country to which he is going. Those two elements must concur.

The Court: He knew where he had to go, and he knew where he was going. He had a right to go back into Canada, and he had a right to go to Finland. He had a right to go back to Canada, and I offered him the chance to go to Canada, and he was all set to go there that day, until your attorney from Minneapolis stepped in and gave him some very bad advice.

Mr. Essin: I can't tell, your Honor, whether the advice of a prior attorney was good or bad—

The Court: As I look at it now, it was bad. Poor old Heikkinen was anxious to go, and he was ready to get out.

Mr. Essin: As a matter of fact, Mr. Heikkinen told me—as I am sure he told prior counsel—he always wanted to go to Finland. That is not the issue here, however. It is the issue that it is incumbent upon the Government to show those two things: He is to leave the United States, and he is to go to X country. And that has got to be
34 set forth.

The Court: Doesn't he have his choice of going to whatever country will accept him?

Mr. Essin: He has his choice, yes.

The Court: The Government doesn't tell him where to go. The Government just says, "Move out."

Mr. Essin: But, your Honor, may I argue the matter?

The Court: Yes, go ahead.

Mr. Essin: To begin with, what is the word—I am asking the question rhetorically; I am not asking the Court—what is the word "deportation"?

It is derived from the Latin word, "deportatio", which means banishment from one country to another country. Those two elements have to be there. And Justice Douglas in the Spector case says the very same thing.

Once it is determined that he is leaving one country, and he is going to—

The Court: The Government in this case gave him his choice. They said he could go to Canada or to Finland or any place—wherever he wanted to go. The Government doesn't tell him where to go.

Mr. Essin: As a matter of fact, the position of the defendant on his prior trial will be reiterated on a
35 subsequent trial, and that is that the order cannot be valid—likewise the indictment, although we will not argue the indictment feature at this time—the order cannot be valid because the order does not specify the country to which he is to go.

The Court: Well, we will reach that question when we get to the trial.

Mr. Essin: Yes, sir.

The Court: But right now—

Mr. Essin: But it is the contention of the defendant that he is entitled to know what steps under Section 156 (a) or (b) the Attorney General, i. e., the Government has taken in connection with its approaches to foreign countries and the representatives of foreign countries—what steps it has taken to effectuate the departure—

The Court: That is entirely irrelevant and immaterial. You are not entitled to any of that information.

Mr. Essin: I assume, then—I understand, then, rather, from the Court's statement on that point that I am being denied Section 3?

The Court: Yes.

Mr. Essin: That is, that the Court is ruling against me on Section 3?

36 The Court: I am, very definitely.

Mr. Essin: All right. Now, may I go to Section 4 of the motion? That is the final section.

We rely completely as to that section upon the Bowman Dairy case, in which the court held that any evidence, even though the Government has no intention—I am paraphrasing the opinion—even though the Government has no intention of offering it in evidence, if it is admissible, must be supplied under Rule 17 (c).

The Court: You tell me what you want, and I will determine whether it is admissible or not. You are not going on a fishing expedition here.

Mr. Essin: We have no intention, your Honor, of going on a fishing expedition.

The Court: You detail on the record here what you want, and if the Court deems it admissible—

Mr. Essin: Well, of course, neither counsel for the defendant nor the defendant has any way of knowing what testimony was offered—or what evidence was offered, rather, in the Grand Jury proceedings. Now, they may be—and those were not offered on the trial—or may not be offered on the subsequent trial. The defendant, as we believe, under Rule 17 (c), has the right to see what this evidence is, which may tend to establish that he has a
37 defense to this indictment.

The Court: That motion is also denied. You will have your defense. The Grand Jury has indicted this man, and the Court has found the indictment is valid. You will have a right to offer your defense.

Mr. Essin: May I review, please—no argument—

The Court: Go ahead.

Mr. Essin. (Continuing) —just as to part 2 of the motion?

In effect, the Court has granted that part; but the Government has stated that it has no additional proof it is going to offer, other than that that it had offered at the first trial.

The Court: That is right. That is very definite.

Mr. Essin: May I now, then, your Honor, in reference to the motion for continuance—and I appreciate that the Court has given me until December 12th—discuss this point just a little further?

Now, I don't know how fast the Immigration and Naturalization Service can move in supplying a transcript of the record. If it is done promptly, I believe I will have adequate time to make a thorough study.

The Court: Well, they will get word today—they
38 will get the word out to them today to get it to you promptly, and you will have it. It is not a very difficult record to study.

Mr. Essin: If I get it within, say, a few days, I believe I will have enough time. If it takes them two or three weeks,—

The Court: They will get it to you just as fast as they can, in accordance with the order of the Court. The Court is directing now that it will be transmitted to you promptly.

Mr. Essin: Thank you.

The Court: There won't be any further continuance, Mr. Rapp, on this. This is contingent, of course, on whether I finish this patent case that I am starting the

latter part of this month—but even if I don't get through with that by that time I will go ahead with this. It won't take but a couple of days.

Mr. Rapp: Yes, sir.

With reference to that Item 4 that Mr. Essin was just arguing, your Honor:

"All documents, books and papers obtained by Government Counsel in any manner other than seizure or process: (a) in the"—

The Court: I have denied that.

Mr. Rapp: We have no objection to that. We know of no such documents, at the outset.

39 The Court: All right. If you want to make it available, you may.

Mr. McDermott: Except with this qualification, your Honor: In that Bowman Dairy case, as you know, the Supreme Court held—

The Court: I am familiar with that.

Mr. McDermott: Yes—I won't go through that, except that the court specifically indicated that the trial court should scrupulously guard against the disclosure of the identity of informants, in permitting the defendant to have access to things of that sort.

The Court: You may withhold that.

Mr. McDermott: Yes. There is this brief argument or comment I would like to make on it—

The Court: Better be careful—I might reverse the ruling I have made.

Mr. McDermott: No, I am going to be very brief about this, your Honor.

Under sub-paragraph 2, the defendant's counsel called your attention to the fact that there had been a change in that paragraph; that the words were "all records", and then "not heretofore offered in evidence by the Government on the prior trial of this cause"—that they have been added.

40 He did not call your attention, however, if it please the Court, to another change—a decided departure from the language employed prior to the first trial. He inserted the phrase in here "or written memoranda."

Now, that obviously could refer only to memoranda or work product of Government employees connected with these deportation proceedings. And there is ample authority to deny—

The Court: That won't be admissible. It is the evidence—

Mr. McDermott: That's right.

The Court: (Continuing) —upon which this order is based.

Mr. McDermott: That's right, and there is ample authority to deny him access to that.

The Court: That's right.

Mr. McDermott: And do I understand he is denied any access to written memoranda of Government employees?

The Court: Oh, yes, of course.

Mr. McDermott: Thank you, your Honor.

(The above and foregoing were all of the proceedings had on the hearing of motions in said cause on this date.)

NOTICE OF MOTIONS.

(Filed Nov. 30, 1955. Edgar M. Alstad, Clerk.)

To: George E. Rapp, Esq.,
United States Attorney for the
Western District of Wisconsin,
Madison 1, Wisconsin.

Please take notice, that the undersigned will bring the attached motions on for hearing before this court in the Court Room of the United States District Court for the Western District of Wisconsin, at Wausau, Wisconsin, on the 1st day of December, 1955, at 1:00 o'clock, in the afternoon of that day, or as soon thereafter counsel can be heard.

M. Michael Essin,
Attorney for Defendant.
840 Madison Building,
623 North 2nd Street,
Milwaukee 3, Wisconsin,
Broadway 1-8683.

Dated: November 29, 1955.

43 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—13,367) * *

**MOTIONS FOR REVIEW AND ORDER HOLDING
THAT NO VALID DEPORTATION ORDER WAS
ENTERED; DISMISSAL OF INDICTMENT; CON-
TINUANCE.**

Now comes the defendant, Knut Einar Heikkinen, by his attorney, M. Michael Essin, and moves this Court as follows:

1. To review the record or records of the deportation proceeding relating to the defendant herein, and to rule that no valid order of deportation was entered.

2. If this Court grants the foregoing motion, to dismiss the indictment.

3. In the event this Court denies the foregoing motions, for a continuance of the trial of the above entitled cause to a date after January 1, 1956.

The grounds in support of motion No. 1 above, are as follows:

1. There is no proper or valid record before this
44 Court which it can review.

2. There is no proper or valid record before this Court upon which a valid order of deportation can be based.

3. The purported record of a deportation hearing furnished to counsel for the defendant contains substitutions which vitiate the validity of said record and of the order of deportation based thereon.

4. Substitutions in the record of the deportation proceeding relating to the defendant were made without notice to the defendant and without his consent or agreement.

5. The entire record of the deportation proceeding relating to the defendant was not furnished to counsel for the defendant, notwithstanding the order of this court.

6. The defendant was denied the right to counsel in the deportation proceeding.

7. The Immigration and Naturalization Service was arbitrary and capricious in denying to the defendant a place of hearing to permit him to have counsel, in violation of defendant's right to due process; the defendant was denied a hearing in New York City, residence of his counsel

notwithstanding that all the Government witnesses who testified against defendant were from New York City.

8. Defendant was denied due process in that the deportation hearings were not conducted in accordance with and pursuant to the provisions of the Administrative Procedure Act and, more particularly, that the hearing officer was at all times an employe, under the control and jurisdiction, of the Agency which prosecuted these proceedings. The examiner was, therefore, not in a position to give a fair hearing to this defendant.

45 9. The findings of deportability and order of deportation are not valid because they are not based upon reasonable, substantial, and probative evidence.

10. The findings of fact in the deportation proceeding were not supported by legally admissible evidence.

11. The hearing officer was not fair and impartial in receiving in evidence Exhibit No. 11 to 14, inclusive.

12. The conclusions of law entered in the deportation proceeding were not supported by legally admissible evidence.

13. The record does not show to what country the defendant was ordered deported.

14. The record does not show that the country to which the defendant was ordered deported, if any, would receive said defendant.

15. The record does not show that the country to which the defendant was ordered deported, if any, had issued travel documents to permit defendant's departure from this country.

16. The record does not show any action by the Attorney General pursuant to 8 U. S. C. 156 (a), by reason of the lack of which the Government is presumed to have waived its right to deport the defendant, and therefore, the defendant is not required to depart from the United States. Neither the record nor the orders of deportation show that the defendant is deportable to any country whatever, or that he could gain admittance to any country.

17. Defendant's rights under the First and Fifth Amendments to the Constitution of the United States
46 were violated.

18. The deportation proceeding constitutes a bill of attainder and is an ex-post facto law.

In support of his motion to dismiss the indictment, defendant re-states all grounds set forth in support of mo-

tion No. 1 above, and asks that they be incorporated in his motion to dismiss the indictment.

In support of his motion for a continuance, in the event motions No. 1 and No. 2, above, are denied by this Court, defendant re-states grounds No. 1 to 5, inclusive, set forth above in support of motion No. 1 and asks that they be incorporated in his motion for a continuance.

Wherefore, the defendant prays this honorable Court to rule that no valid order of deportation was entered, and to dismiss the indictment, and in the event these motions are denied, for a continuance of the trial of this cause, on the grounds hereinabove set forth, and on the basis of the supporting affidavit attached hereto and made a part hereof.

Dated this 29th day of November, 1955.

Respectfully submitted,

M. Michael Essin,

Attorney for Defendant,

840 Madison Building,

623 North 2nd Street,

Milwaukee 3, Wisconsin,

Broadway 1-8683.

47

IN THE UNITED STATES DISTRICT COURT,

* * (Caption—13,367) * *

AFFIDAVIT.

State of Wisconsin, {
County of Milwaukee. } ss.

M. Michael Essin, being first duly sworn on oath, deposes and says:

1. Affiant is the attorney for the defendant, Knut Einar Heikkinen, in the above entitled action and has his offices and resides in the City of Milwaukee, County of Milwaukee, State of Wisconsin.

2. On April 13, 1955, the United States Court of Appeals for Seventh Circuit handed down its decision reversing the conviction in this court of the defendant herein on April 13, 1954, and remanding this case for a new trial.

3. On or about October 28, 1955, the affiant on behalf

of the defendant herein, filed with this court a motion in the alternative, for an order of the court fixing the time and place for pre-trial discovery of documents pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure. On or about the same date the affiant also filed, on behalf of the defendant herein, a motion to dismiss the indictment.

4. On or about November 2, 1955, the Affiant, on behalf of the defendant herein, also filed a motion for continuance of the trial of this cause to a date after January 1, 1956, with a supporting affidavit of said defendant.

5. Copies of the motions hereinabove referred to were served upon George E. Rapp, Esq., United States Attorney for the Western District of Wisconsin.

6. On the 8th day of November 1955, argument was had, the parties herein appearing by their respective counsel, in this Court at Madison, Wisconsin, and rulings were thereupon made by this Court on the motions hereinabove referred to.

7. On the hearing on November 8, 1955, the court, set the trial in the above entitled cause for December 12, 1955.

8. On the hearing on the motion for pre-trial discovery, referred to above, the Court granted, among other things, the following part of said motion:

"Transcript of the record of the deportation proceedings against the defendant, which proceedings were conducted by the United States Immigration and Naturalization Service of the Department of Justice."

9. The court, in granting that part of the motion hereinabove referred to ordered, in substance, that the Government furnish the affiant, as attorney for the defendant, on a loan basis, a copy of defendant's file relating to the administrative proceeding upon which the order of deportation was entered.

10. At the conclusion of the hearing on November 8, 1955, affiant conferred informally with George E. Rapp, Esq., in the latter's office, on the mechanics, among other things, of the expeditious furnishing to the affiant of the file of the administrative proceedings hereinabove referred to.

11. At the informal conference hereinabove referred to, the affiant accepted Mr. Rapp's offer for the use of the latter's office copy pending receipt of a copy of said file of the administrative proceeding from the Immigration and Nat-

naturalization Service. On or about November 9, 1955, the affiant received a letter from Mr. Rapp confirming the informal conference of November 8, 1955. A copy of this letter is attached to this affidavit, made a part hereof, and marked Exhibit "A".

12. On information and belief, affiant states that the copy of the file of the administrative proceeding relating to the defendant herein, is identical to the file of the proceeding deposited with the Court on November 8, 1955. The certification attached to the file furnished the affiant read in part:

"* * * there are attached deportation hearing; hearing officer's decision; exceptions to hearing officer's decision; Commissioner's decision and order; notice of appeal; Board of Immigration Appeals' order and warrants of deportation, together with all exhibits contained in the deportation hearing with the exception of Exhibits 11, 12, 13, and 14, which have been lost or destroyed. There are attached copies of Exhibits 11, 12, 13, and 14, which have been reproduced from other sources.

13. Upon receiving from Mr. Rapp a copy of the file of the administrative proceedings relating to the defendant, affiant promptly began study thereof for possible motions and challenges.

14. On or about November 14, 1955, affiant received a telephone call from a Mr. C. Fredrickson, Investigator for the Immigration and Naturalization Service in the Milwaukee office informing affiant, in substance, that said office had received from the Chicago office of the Immigration and Naturalization Service for transmission to the affiant a copy of the file of the administrative proceeding relating to the defendant herein. It was agreed between said Mr. Fredrickson and the affiant that at the first available opportunity, either Mr. Fredrickson would bring said file to the office of the affiant, or the affiant would stop at the Federal Building to pick up said file.

15. On or about the 25th day of November 1955, the affiant received a letter from Mr. Rapp dated November 23, 1955, stating among other things, that Mr. Rapp assumed that the affiant had been furnished with a copy of the deportation hearing and requesting a return of the copy loaned by Mr. Rapp to said affiant. A copy of the letter of November 23, 1955 from Mr. Rapp is attached hereto, made a part hereof, and marked Exhibit "B".

16. On the 28th day of November, 1955 the affiant called upon Mr. C. Fredrickson in the office of the latter, in the Federal Building in Milwaukee, to receive a copy of the record of the deportation proceedings relating to the defendant herein. At that time, Mr. Fredrickson informed the affiant that he had a memorandum from the Chicago office of the Immigration and Naturalization Service addressed to the Milwaukee office of said Service, dated November 9, 1955, which in substance stated that the original Exhibits 11 to 14, inclusive, had been found and that the Chicago office of the Immigration and Naturalization Service was in the process of making copies to be furnished to the Court. To the best of affiant's knowledge and belief, affiant first learned of the discovery of the alleged original Exhibits Nos. 11 to 14, inclusive, on November 28, 1955, as a result of the statement of Mr. C. Fredrickson hereinabove referred to.

17. On the 28th day of November 1955, upon receiving the record of the deportation proceedings relating to the defendant, affiant made a comparison of the record received from Mr. Fredrickson of the Milwaukee office that same day with the record received from Mr. Rapp on November 8, 1955. To the knowledge and belief of the affiant, both records and certifications thereof appeared to be identical.

18. To this date, affiant has not been furnished with, and has not viewed, a record of the deportation proceeding relating to the defendant which include the alleged original exhibits, or certified copies thereof, Nos. 11 to 14, inclusive, hereinabove described by Mr. Fredrickson.

19. Affiant believes that there are substantial defects in the record of the deportation proceeding relating to the defendant and that there is no proper or valid record of the deportation proceeding upon which a valid order of deportation could have been entered. Furthermore, affiant, as to the record made available to him, is prepared to raise substantial challenges thereto. Affiant further believes that substantial challenges may be made to any purported record of the deportation proceeding, after time is allowed for study thereof, if such record contains alleged original Exhibits Nos. 11 to 14, inclusive, described as lost or destroyed in the certification accompanying the record furnished to the affiant on November 8, 1955.

20. Affiant further believes that the record of the deportation proceeding furnished to him, or the record of the

deportation proceeding described by Mr. Fredrickson and referred to above, but not to date viewed by affiant or both do not constitute a proper and valid record which this court can review and find that a valid order of deportation could have been entered thereon.

21. Affiant submits this affidavit in good faith, in support of defendant's motions: for an order of this Court holding that there is no proper or valid record of the deportation proceeding relating to defendant upon which a valid order of deportation was, or could have been entered; for dismissal of the indictment and, in the alternative, in the event the foregoing motions are denied, for continuance of the trial of this cause.

M. Michael Essin.

Subscribed to and sworn to before me this 29th day of November, 1955.

Russell Goldstein,
Notary Public,
Milwaukee County.

My commission expires October 25, 1959.

UNITED STATES DEPARTMENT OF JUSTICE.

United States Attorney,

Western District of Wisconsin,

Madison 1, Wisconsin,

November 8, 1955.

Mr. M. Michael Essin,
Attorney at Law,
840 Madison Building,
623 North Second Street,
Milwaukee 3, Wisconsin.

Re. U. S. v. Knut Einar Heikkinen
No. 13,367 Criminal

Dear Mr. Essin:

This will confirm our informal conference after arguments on your motions this 8th day of November, 1955. A call was made to Mr. Joseph Cushman of the Chicago District Office of the Immigration and Naturalization Service, wherein I advised Mr. Cushman of the Judge's order relating to their furnishing you, on a loan basis, a copy of the Knut Einar Heikkinen file relating to the administrative proceedings upon which the Order of Deportation was entered. You are also aware of the fact that, in this conversation, I requested Mr. Cushman that the material be furnished you expeditiously. To avoid any further delay, I transmitted to you my office copy, which has been certified by an appropriate Government office, to be used by you pending your receipt of a copy from the Immigration and Naturalization Service.

Very truly yours,

/s/ George E. Rapp,

United States Attorney.

GER:s

cc: The Honorable Patrick T. Stone,
Judge, United States District Court,
Western District of Wisconsin,
Madison, Wisconsin.

54

Exhibit "B".

UNITED STATES DEPARTMENT OF JUSTICE
United States Attorney,
Western District of Wisconsin,
Madison 1, Wisconsin,

November 23, 1955.

Mr. M. Michael Essin,
Attorney at Law,
840 Madison Building,
623 North Second Street,
Milwaukee 3, Wisconsin.

Re: United States v. Knut Einar Heikkinen ^{7th}

Dear Mr. Essin:

With reference to the order of the Court requiring me to make available to you any exhibits introduced at the Grand Jury investigation in the above entitled matter, please be advised that I have caused the official court reporter, John R. Adams, to review his notes, and I have been advised by him this date that he was busy in open court at Madison on November 9 and 10, 1953, and was not requested by Mr. Nikolay, the then United States Attorney, to report any of the proceedings before the Grand Jury at their sessions of November 9 and 10, 1953. A check of the Grand Jury proceedings in the Clerk of Court's office does not reveal that any exhibits were introduced. To the best of our knowledge, there is neither a transcript of the Grand Jury proceedings, as a result of which Mr. Heikkinen was indicted, nor were there any exhibits introduced.

I assume that, by this time, you have been furnished with a copy of the deportation hearing and have no further use for the photostatic copy which you borrowed from me. I therefore would appreciate your returning these documents, pursuant to our agreement.

Very truly yours,

/s/ George E. Rapp,

United States Attorney.

GER:s

56

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—13,367) *

STENOGRAPHIC TRANSCRIPT

of proceedings had in the above-entitled cause, heard in said Court, sitting in the City of Wausau, in said Western District and State of Wisconsin, the Honorable Patrick T. Stone, Judge, presiding; said cause having come on for hearing on Thursday, the 1st day of December, 1955, at 1:00 o'clock in the afternoon, upon motion heretofore filed by the defendant.

57 Appearances:

Hon. George E. Rapp, United States Attorney;
Madison 1, Wisconsin;

Mr. Irving R. Freedman, Attorney, Immigration and Naturalization Service, Department of Justice, Chicago, Illinois; Attorneys for the plaintiff.

Mr. M. Michael Essin, Attorney at Law, Milwaukee, Wisconsin, Attorney for the defendant.

58 The Clerk: U. S. versus Knut Heikkinen.

The Court: I will say, Mr. Essin, I have read your motion and there is some merit to what you advance.

The Court will, pursuant to your request, review the original order, or a certified copy of the entire record of the deportation proceedings; and will grant you a continuance until after the first of the year,—I will fix a date. And on or about December 12th—on your motion to dismiss the indictment, you can renew that after I have reviewed the deportation proceedings.

Mr. Essin: Do I understand, then, your Honor, that on—I am to come back to court on December 12th for the argument—

The Court: On your motion to dismiss the indictment.

Mr. Essin: Yes, I see.

The Court: And in the meantime—Now, Mr. District Attorney, can you provide the Court—Mr. Essin in his motion papers says he contends that you didn't supply him with a complete record.

Now, what are the facts as to that?

Mr. Rapp: Now, if it please the Court, let me say this:

59 That on November 8th, after the proceedings in court, I had Mr. Essin in my office, with my Assistant present; and at that time I made available to him, or I had available to me at that time, which was the entire proceedings, the administrative record of the administrative proceedings leading up to the order of deportation. And the certificate therein said that it was a true and correct copy, and it said, "together will all the exhibits contained in the deportation hearing with the exceptions of 11, 12, 13 and 14, which have been lost or destroyed; that there are attached copies of Exhibits 11, 12, 13 and 14, which have been reproduced from other sources."

Now, to make the record entirely clear, your Honor, let me say that Exhibit 11 was the testimony of Knut Einar Heikkinen that was taken in a habeas corpus proceedings shortly after the warrant of arrest for him was entered, in the area—around 1950. The original transcript was not available, it having been lost. But attached, or in this copy that was furnished to Mr. Essin was the same transcript of Mr. Heikkinen's testimony, certified to by the Clerk of the United States Court of Appeals for the Eighth Circuit.

This matter was on habeas corpus before a three-
60 man court, and then appealed to the Eighth Circuit Court of Appeals. And the Clerk of the United States Court of Appeals for the Eighth Circuit testified, or certified that the testimony that was attached here was the same as that which was given at the time of the habeas corpus proceedings—it just being another thing, so it is the same, identical material.

The Court: Well—

Mr. Rapp: Now, I have gone through—I have since been furnished—let me further state that Exhibits 13 and 14, were copies of issues of The Daily Worker, which were exhibits, and which contained certain material.

I have since been furnished by the Immigration and Naturalization Department—well, I had been advised prior to that, those documents which had been temporarily mislaid had been found, and that they were in the process of reproducing them and making them available to me.

At the time, on November 8th, that I delivered this to

Mr. Essin (indicating document), it was what I had available.

I pointed that certificate out to him, and I told him 61 at that time—I think on more than one occasion, and

I think my Assistant will bear me out—that those documents, 11, 12, 13, and 14, were reproductions, and that the originals thereof would be available at a future time, and that I wouldn't have been surprised if the ones that were going to be sent to him from Chicago would contain the originals.

And I made quite a point of that. So that his affidavit in that respect does not reflect his recollection.

The Court: Now, do you have—

Mr. Rapp: So I now have, and will present and introduce to the Court the record of the deportation hearings, the Hearing Officer's decision; exceptions to the Hearing Officer's decision; the Commissioner's decision and order; Court of Appeal, Court of Immigration Appeals' order; and Warrant of Deportation; together with all exhibits contained in the deportation hearing, with the exception of Exhibits 12, 13—no, 11, 12, 13, and 14; and that, attached to this exhibit are copies of Exhibits 11, 12, 13, and 14, which have been produced from other sources. And this is in the Matter of, or Relating to Knut Einar Heikkinen, File No. 4,316,699.

62 And also I would like to present and introduce to the court in this matter—

The Court: Mark it, first, as Exhibit 1.

(Document produced by Mr. Rapp is marked EXHIBIT 1 of 12/1/55, and received in evidence.)

63 Mr. Essin: Your Honor, may I ask, just for a point of clarification in my own mind, that the record that Mr. Rapp has just described, I presume—

The Court: Marked Exhibit 1?

Mr. Essin: Marked Exhibit 1, I presume is a copy of the one which I received in Milwaukee; and also a copy of the one I received from Mr. Rapp on November 8 at the conclusion of arguments on the motions of that date. Is that correct?

Mr. Rapp: Exhibit 1 is identical to the one that I handed to Mr. Essin in my office on November 8th.

The Court: Now, do you supplement that with something additional?

Mr. Rapp: I am also supplementing Exhibit 1 with (producing document) —

The Court: Mark that Exhibit 2.

(Document produced by Mr. Rapp is marked EXHIBIT 2 of 12/1/55, and received in evidence.)

64 Mr. Rapp: (Continuing.) —with certain exhibits that were introduced at the deportation hearings of Knut Einar Heikkinen.

The Court: You are now speaking about Exhibit 2?

Mr. Rapp: That's right. Exhibit 2 contains, or has attached thereto, Exhibits 11, 12, 13, and 14, which were contained in the deportation hearing of Knut Einar Heikkinen.

And I might advise the Court that I have taken the trouble of, page by page, going through the record of Mr. Heikkinen's testimony, and I find it to be identical with that which was furnished to Mr. Essin on November 8th by me.

The Court: Now, do Exhibits 1 and 2 comprise the entire deportation record?

Mr. Rapp: It is the entire deportation record. Now, —

The Court: Now, how much of that have you, Mr. Essin?

Mr. Essin: I am sorry?

The Court: How much of that record do you have? Do you have all of Exhibit 1?

(Mr. Essin examines Exhibits 1 and 2.)

65 Mr. Essin: I have all of Exhibit 1. But none of Exhibit 2.

The Court: None?

Mr. Rapp: Exhibit 2 is merely a duplication of certain parts of Exhibit 1.

The Court: All right. That will be—that isn't too voluminous. You can examine that here this afternoon, and leave it with the Clerk for me, so that I will have a chance to examine it.

Mr. Rapp: Please the Court, I want these introduced into evidence here.

The Court: Yes, they have been received.

Mr. Rapp: So that your Honor may have them available.

The Court: They have been offered and received.

Mr. Essin: Your Honor, there are a few points that I would like to clear up at this point in reference to these records, and in reference to the statements of Mr. Rapp, as to what I received and what I did not receive. And I

think it is necessary that the Court have the facts as to what actually happened.

The Court: Well, —

Mr. Essin: Now, my affidavit in support of my motion indicates the basic facts. Now, I did receive
66 a copy of Exhibit No. 1 on November 8th. I do not recall any reference by Mr. Rapp—he may have made it, but I don't recall hearing it, any reference to—

The Court: Well, maybe you ought to have a court reporter around when you fellows confer, from now on.

Mr. Essin: That may be necessary.

Mr. Rapp: Please the Court, we will see that that is done in the future.

The Court: From now on, you had better have a reporter present. Well, there is no need discussing that here, but ordinarily when you file a motion in this court, you support it with your brief. There is no brief here.

Now, can you supply the Court, within five days, with a short brief on the points you mention?

For instance, you mentioned one point: That during the deportation proceedings the defendant was deprived of counsel.

Now, a deportation proceeding is not a criminal proceeding, and he is not entitled to counsel, under the rulings of our Supreme Court. But on all the points you make, you should supply the Court with a brief within five days
67 so that then we take up that motion on December 12th at Madison, and I will review these proceedings, and then I will fix a date for the trial after the first of the year.

Mr. Essin: Your Honor, I would like to ask for this consideration of the matter: In view of the two records here, I would like to file, without argument on that amendment, I would like leave to file an amended motion, because until I look at this (indicating Exhibits 1 and 2) —

The Court: What is your amended motion?

Mr. Essin: (Continuing.)—which will embrace the issues, in the main, in part—at least in part in my first motion which was on for argument here today, and will include references to the fact that there are two records now, Exhibit 1 and Exhibit 2.

The Court: And Exhibit, as the District Attorney says, simply supplements that first exhibit with the original record.

Mr. Essin: Yes, but, you see, my challenge may be different. I don't know until I will look through them both.

The Court: You will have a chance to look at them here this afternoon.

Mr. Essin: May I ask, your Honor, for one 68 additional consideration in this matter?

I want to make a very careful comparison. As I explained on the hearing on November 8th, the usual procedure of the Immigration Service is to loan, as the Court ordered, the loan of Exhibit No. 1 to the counsel so that he may go through it and get the best information available, and prepare the best challenges, if there are any challenges, in his client's interest.

Now, I would like to take a copy of this (indicating), along with a copy of Exhibit 1, which I have had, back to my office in Milwaukee.

The Court: Do you have an additional copy?

Mr. Rapp: Please the Court, I do not have additional copies, but in that connection—

The Court: Well, wait a minute.

You will have a right to examine that in the Clerk's office here this afternoon, but I want that left here, because, as I say, I want to review that record myself. And Mr. Rapp says it is simply a copy of the other exhibit, or at least most of which is already in the other exhibit. You can take a few minutes off and examine that as much as you wish here in the Clerk's office. You can go through that right here in the Clerk's office, but I want that 69 available here.

Mr. Essin: May I ask whether Exhibit No. 1 may be retained by me on the same basis as ordered by the Court on November 8th?

The Court: Yes. You have it now.

Mr. Essin: Yes, and I will return to counsel, on the record now, the record which he loaned me on November 8th. Here it is (submitting record to Mr. Rapp), and the counsel may examine it and satisfy himself that that is the complete record.

The Court: Is that Exhibit—

Mr. Essin: That is Exhibit 1.

Mr. Rapp: This is Exhibit 1?

Mr. Essin: Yes.

The Court: You are all through with that now, are you, Exhibit 1?

Mr. Essin: Yes, because I have the copy furnished to me.

The Court: I see. All right. Now, let it be clearly understood, you can examine Exhibit 2 here in the Clerk's office.

Mr. Essin: Yes, your Honor.

The Court: And you will supply the Court with your brief in five days, supporting your motion.

70 Mr. Essin: And an amended motion, if I feel it is necessary?

The Court: And an amended motion.

Mr. Essin: All right, your Honor.

Mr. Rapp: Please the Court, I think counsel here is merely attempting some additional dilatory practices on this Court, and I am opposed to it. I want the Court to understand, and everyone else concerned, that the Government is ready to proceed to trial at any time. We have been for a considerable period of time, and we do in fact have arrangements made for our witnesses for the 12th, and—

Mr. Essin: Your Honor, I feel that I have to answer that—

Mr. Rapp: They are not under subpoena; they are Government witnesses, however, and we have made those arrangements. But I just want the Court to understand that we are ready and available.

The Court: Well, this is an important case—

Mr. Rapp: We did not in any instance make any attempt to withhold any information. As a matter of fact, I could have sat back on November 8th and waited for Chicago to furnish him with copy of what we had available at that time, but I did not do so.

71 The Court: When did you have Exhibit 2 available and ready for his use? When did you offer that to him?

Mr. Rapp: I have never offered it to him. But it contains the same things as Exhibit No. 1. It is identical.

Mr. Essin: Your Honor, I would like to comment on that statement, if I may.

The Court: Well—

Mr. Essin: Now, counsel here is accusing counsel for defendant of dilatory tactics. It is obvious on the face of the record as to what Exhibit 1 is, that there are certain very valid objections—I am not going into that now—

The Court: How many continuances has this Court given you so far? About three, haven't I? And I am going to give you another one now, but we aren't going to continue it any further. I will fix a date for the trial of this case shortly after the first of the year.

Mr. Essin: At the hearing on the motion on December 12th?

The Court: On December 12th.

Mr. Essin: Will that be in Madison?

72 The Court: In Madison, at nine o'clock in the forenoon.

Mr. Essin: In Madison, at nine o'clock. Thank you, your Honor.

Mr. Rapp: Now, just to clear up one further thing: He is to file a brief on or before December 5th, is that correct?

Mr. Essin: No, in five days.

Mr. Rapp: In five days. This is December 1st—

The Court: That is right. That will be December 6th.

Mr. Rapp: That's right, and then do we have—

The Court: You will have a copy of that, certainly.

Mr. Rapp: Then do we have time to reply to that brief?

The Court: Sure. You will have time to reply. You will have until the 10th. You will have five days.

Mr. Rapp: The 6th to the 10th is not quite five days, your Honor.

The Court: Wait a minute—no, that's right. Well, if you get it on the 8th—will you require five days to get your brief out?

73 Mr. Essin: Yes, your Honor.

The Court: Well, you can—you had better file yours with the Court on the 10th, whether it is two or three days after you get it or not. I don't care.

Mr. Rapp: All right, sir.

The Court: I want to be prepared to hear your motion on the 12th.

Mr. Rapp: All right, sir.

The Court: Now, I might say after we get through with the criminal proceedings here, Mr. Rapp and you can go in to the Clerk's office with this exhibit, and you can examine it there.

Mr. Essin: Yes, your Honor.

(The above and foregoing were all the proceedings had on the hearing on said motion on this date.)

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of proceedings had in the above-entitled cause, in said Court, sitting in the City of Madison, in said Western District and State of Wisconsin, before the Honorable Patrick T. Stone, Judge, presiding; said cause having come on for hearing on motion heretofore filed by the defendant, on Tuesday, the 13th day of December, 1955, beginning at 9:45 o'clock in the forenoon.

Appearances:

Hon. George A. Rapp, United States Attorney, Attorney for plaintiff.

Mr. N. Michael Essin, Attorney for defendant.

76 The Clerk: United States *vs.* Knut Heikkinen.

The Court: I might save you men a little time and trouble, by telling you I have read your briefs. Have you anything to add to your briefs?

Have you, Mr. Essin?

Mr. Essin: Well, nothing except to comment on some of the points, your Honor, raised in the Government's brief.

The Court: You may make what comment you wish. I have read your brief; I have read the Government's brief. I don't think any further argument is necessary, but if Mr. Essin desires to make some further comment, he may.

Mr. Essin: Yes—if I may have just a few moments, your Honor.

If the Court please:

At one point in the brief of the Government it refers to the second hearing in Duluth as being a new proceeding.

Now, I don't know whether that was just an error in terminology or not—whether the Government meant to say "hearing" and not "proceeding". But the record is very clear that the hearing in Duluth was not a new proceedings, but was just a hearing *de novo*, based on the *Sung vs. McGrath* case.

77 The warrant of arrest of alien, which was issued and served in 1949 in New York, and upon which the first hearing was held, in which Mr. Englander of New York City had been retained and was counsel for the defendant, was the very same warrant upon which the subsequent hearing in Duluth was proceeding.

The Court: The Court understands that.

Mr. Essin: Now, in reference to the remarks or comments made in the Government's brief, while perhaps it was not the intention of the Government to treat that point lightly, it sounded so to me. However, I feel that, regardless of the import that the Government intended to have on that point—it referred, for example, to Mahomet, comparing Mr. Englander to Mahomet, asking the mountain to come to Mahomet.

Well, if I may be permitted to comment on it—and I don't have any intention, your Honor, of being jocular—

The Court: I don't think it is necessary.

Mr. Essin: No—the point I wanted to make was that this particular mountain did—the I. and N. S. was the mountain—they moved from New York, where the first hearing was held—

The Court: Mr. Heikkinen moved from New York to Superior. It was he that moved—and for the accom-
78 modation of Mr. Heikkinen the Government forwarded its proceedings to Duluth. That is the interpretation I put on the whole thing.

Mr. Essin: Your Honor, but the Government—

The Court: And with reference to the fact that this New York attorney didn't want to come out there, he had every opportunity to employ other attorneys, and he did employ another attorney in the habeas corpus case. Mr. Englander wasn't the only lawyer in America. So I don't give that very much importance. There is no merit to the claim that he was deprived of counsel.

Mr. Essin: But, your Honor, it was not for Heikkinen's convenience that the hearing was held in Duluth. He asked, through his counsel, that the hearing be held in New York, because that is where the counsel was; that is where the case had always been—

The Court: That is where the proceedings originally started. Then he moved out to Duluth, or to Superior, and he had been there for possibly a year before the proceedings were resumed, and I assume the Government thought for his accommodation—

Mr. Essin: He didn't ask for that accommodation, your Honor.

The Court: I know, but perhaps they assumed that.

79 Mr. Essin: May I add—

The Court: Nevertheless—is there anything further you want to say? I have pretty well made up my mind how this should be decided, from reading your brief—but is there any further comment you want to make?

Mr. Essin: Well, no extemporaneous comment at this point—if I may be given a moment to check through my notes?

The Court: Yes.

Mr. Rapp: Let me say, without interrupting Mr. Essin's argument, that it is the policy of the I.N.S. to hold the hearings at the residence of the alien, or as close to his residence as can possibly be done. And that was the sole reason that the matter was switched from New York to Duluth.

The Court: That is what I assumed.

Mr. Rapp: As a matter of fact, if it had been scheduled in New York, I am certain that the same objection would have been raised—or a similar objection.

Mr. Essin: Well, we can't go into that. That wasn't the issue—

Mr. Rapp: But Mr. Essin is also—

The Court: That is all immaterial.

Mr. Rapp: Yes.

80 Mr. Essin: Your Honor, may I point to this? It is mentioned in my brief, and I would like, if I may be permitted, to reiterate this point—

The Court: Yes.

Mr. Essin: Section 1005 of the Administrative Procedure Act, which states—and I underlined in my brief that portion of that section of the Act—

Mr. Rapp: What page?

Mr. Essin: I am sorry—on my brief it is page 13, where Section 1005 of Title 5 of the United States Code is quoted?

"Each agency shall proceed with reasonable dispatch to conclude any matter presented to it, except that due regard shall be had for the convenience and necessities of the parties or their representatives."

Now, if no prior hearing had ever been held, your Honor, on the Heikkinen matter—if out of the clear blue Heikkinen suddenly designates a counsel who had never represented him before, hundreds or perhaps thousands

of miles away—certainly his objections would not have been valid.

But here was his counsel who had been retained—the I.N.S. knew about it—the I.N.S. knew that Englander had represented Heikkinen in the prior proceedings—this is not a proceeding de novo; it is simply a hearing de
81 novo—and now can the I.N.S. come in here or at any time and say it was for the convenience of Heikkinen that the hearing was being held in Duluth?

The Court: Well, I disagree with you. I think it was for his convenience, and I think that was what they had solely in mind. That was where he lived, and the Government no doubt felt they should not subject him to all the expense of going back to New York, when he could have hired an attorney in Duluth, or in Superior, Wisconsin.

Mr. Essin: Your Honor—

The Court: It would have been less expensive to him.

Mr. Essin: It would have been less expense to him, your Honor, if he had gone to New York, rather than to pay the day rate of an attorney out where—

The Court: There is no point to that. I feel it was for his convenience; and I also feel he was not deprived of counsel. He had every opportunity that any man was ever offered, to employ counsel to represent him and to appear for him in this case here. The hearing was continued from time to time to give him an opportunity to employ counsel.

Mr. Essin: Well, from the very beginning your Honor,—

82 The Court: Is there anything further you want to reply to the Government?

Mr. Essin: Well, if I may.

Now, in the Government's brief, a point is raised by the Government that counsel for the defendant in the prior hearing in this Court in Wausau on this matter had waived any objections to the submission of what is now called in this hearing, or in this proceeding, Exhibit No. 2.

Now, having read the transcripts of the hearings, both on November 8th and on December 1st, I find nothing in the submission, or nothing in the record to indicate that defendant's counsel—myself, in this instance—waived any objections to the submission of Exhibit No. 2.

The Court: Whether you waive your objection or not, Exhibit 1 and Exhibit 2 are going to be admitted in this.

trial—at least for the information of the Court. They are in the record now.

Mr. Rapp: May it please the Court, what we were referring to there was the fact that we exhibited those to counsel prior to our offering them as exhibits; we did in fact make that offer, and they were accepted. The counsel for the defendant made no objection to their admission at the hearing at Wausau—

83 Mr. Essin: Now, wait—

Mr. Rapp: (Continuing.) —on December first. I think the record is clear on that point.

The Court: Were these Exhibits 1 and 2 offered in evidence at that time?

Mr. Rapp: Yes, sir, and you accepted them, and there was no objection made.

Mr. Essin: Just a moment, Mr. Rapp. I know that you don't want to cut in on me, but you want to answer the Court's questions—and I am sure the Court will give Mr. Rapp opportunity to answer me if he wants to—

The Court: Go ahead.

Mr. Essin: Now, the Court asked—the Court directed, both on November 8th and on December 1st, that the record of the proceedings leading up to the order of deportation be submitted to the Court,—I am paraphrasing, in substance, what occurred—so that the Court may study it, review it, and make a determination as to whether or not there had been due process, and the other factors involved.

The Court: Yes.

Mr. Essin: There was no statement by this Court, nor was there any statement by counsel for defendant, that the defendant was waiving any rights to challenge
84 anything.

The Court: No, you can challenge it now. I told the District Attorney to mark those as Exhibits 1 and 2, and to offer them in evidence; and they were received in evidence; and if you are objecting to them now, your objection is overruled.

Are you objecting now?

Mr. Essin: I am making all the challenges as incorporated in my motion—

The Court: Are you objecting to the admission of Exhibits 1 and 2?

Mr. Essin: Yes, your Honor.

The Court: Your objection is overruled. Now, why do you object to it?

Mr. Essin: Because I do not feel it is a proper record for this Court to review—

The Court: What did the Court of Appeals tell this Court?

Mr. Essin: Well,—

The Court: What were those benchmarks they sent out for me to follow? Well, let's not discuss that?

Let me bring this to a close by saying this?

I have reviewed Exhibits 1 and 2, and the proceedings in the deportation proceedings, and the Court finds that there is ample evidence to support the findings of the officials in charge of the deportation proceedings, and that there has been a valid order of deportation entered.

Now, that is what the Court finds.

And we will set this case for trial on the second Monday in January—wait a minute. Have you got a January calendar?

The Clerk: Yes, sir.

Mr. Essin: I have a little calendar here, your Honor— one side is 1955 and one side is '56.

The Court: On the 9th day of January, at ten o'clock.

Mr. Essin: The 9th day of January, at ten o'clock.

The Court: Call the next case.

(The above and foregoing were all of the proceedings had on the hearing of said cause on this date.)

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of proceedings had and evidence offered on the trial of the above-entitled cause, heard in said Court, sitting in the City of Madison, in said Western District and State of Wisconsin, before the Honorable Patrick T. Stone, Judge, presiding, and a jury; said cause having come on for trial on Monday, the 9th day of January, 1956, at 9:00 o'clock in the forenoon.

Appearances:

Hon. George E. Rapp, United States Attorney;
Mr. James H. McDermott, Assistant U. S. Attorney; Attorneys for plaintiff.

Mr. N. Michael Essin, Attorney for defendant.

The Defendant, Knut Einar Heikkinen, was present in person.

90 (Prior to the selection of the jury the following pre-trial proceedings were had in the Court chambers, between the Court and counsel:)

Mr. Essin: Your Honor, in this matter coming up for trial this morning, there are a number of matters I would like to discuss on the record with the Court and with counsel for the Government.

First, in reference to the hearing which was held on our motion for pre-trial discovery on November 8th, there does not appear to be a complete transcript of that hearing, because I am under the impression—and I believe Mr. Rapp is too—that there were certain rulings made by this Court on various parts of my motion for pre-trial discovery. I am pretty sure it was inadvertent, but in any event—

The Court: Well, at that time, as I recall, the Government was willing to supply you with the certified copies of the records of the deportation proceedings.

Mr. Essin: No, in addition to that that appears in the transcript—

The Court: That has been done.

Mr. Essin: That appears in the transcript. In addition, there were rulings by the Court in reference to any other documents—I am paraphrasing that part of the motion—which might have been presented before the Grand
91 Jury—

Mr. Rapp: Now, I wrote you a letter with reference to that, Mr. Essin.

Mr. Essin: Yes, that is right.

Mr. Rapp: I think the Judge had a copy of that letter, in which we told you we had examined the records and find that there wasn't even a report of that.

Mr. Adams, the official court reporter, was not present at the Grand Jury proceedings.

Mr. Essin: That is not the issue, Mr. Rapp.

The Court: Let him finish, will you?

Mr. Essin: I am sorry, your Honor. I am sorry.

The Court: And in the trial of this case, I don't want either of you to be interrupting.

Mr. Essin: I am sorry.

Mr. Rapp: And that there is no record in the Clerk's office or anywhere else of any exhibits that were introduced at the Grand Jury proceedings,—

The Court: Do you have any recollection now of your own?

Mr. Rapp: (Continuing.) —which resulted in the indictment.

The Court: Do you have any knowledge of any exhibits that might have been introduced?

Mr. Rapp: No, sir. We have checked and we find
92 nothing. You understand, your Honor, that I did not present this matter to a Grand Jury, which was before my tenure in office.

The Court: But you now say you have made a thorough investigation?

Mr. Rapp: We have made an investigation in the Clerk's office, in our docket, and we have checked with the official court reporter; and we find that no transcript was made of the Grand Jury proceedings and that there is no record of any exhibits having been introduced.

The Court: That seems to cover it.

Mr. Essin: May I answer that, your Honor?

The Court: Yes.

Mr. Essin: That is not the issue, what Mr. Rapp has explained, because he wrote to me generally to that effect in the letter.

The only point I was making, your Honor, was that, due to inadvertence, perhaps—I don't know what the reason was—that discussion which occurred in court, and the rulings made in connection with the motion does not appear in the transcript of the records that I have been furnished. That is the point I was making.

The Court: Oh, well, that can be supplied.

93 Mr. Essin: That is the only point I was making.

The Court: If there is anything that has been omitted the court reporter can certainly supply that, yes.

Mr. Essin: I feel it was inadvertence.

The Court: Yes.

Anything else?

Mr. Essin: Now, the next point is: What is the position of the Court on references made in this trial to the prior trial?

The Court: There will be no reference to that at all. Unless—There will be no references to what was the disposition of the prior trial, or no reference to what the Court of Appeals said. If there are any exhibits that were offered in the former trial, that were marked, if you want to re-offer them they can carry the same markings that they had before.

Mr. Rapp: Now, in that connection, your Honor, I would like to refer to Exhibit 6-A, which was introduced at the last trial. It was 6-A at that time.

The Court: What is 6-A?

Mr. Rapp: Exhibit 6-A is a sworn statement of Knut Einar Heikkinen, taken by John J. Boldin on February 12, 1953. It consists of eight pages. It is a sworn statement. It was reduced to typewritten form and signed
94 and initialed, each page initialed by Mr. Heikkinen.

At that trial, I read this statement into the record. You reserved a ruling on portions of its admissibility, and at the conclusion of the trial you again examined it, and you removed pages 6 and 7, and placed a blank sheet of paper over a portion of page 8.

Now, I propose again to use this Exhibit 6-A. How do you want me to handle pages 6 and 7 and portions of 8?

The Court: Well, if I ruled them out—Did the defense want pages 6 and 7 in there?

Mr. Rapp: You objected—

Mr. Essin: I am sorry?

The Court: Did you have any objection to pages 6 and 7?

Mr. Essin: Oh, yes, I do. But may I suggest a procedure on that, Judge?

The Court: Yes.

Mr. Essin: If the Government intends to submit what has in the first trial been called Exhibit 6-A in the original form, you can offer it, and I would like to review it again for a few minutes on the trial, and make my motions to the Court as to what parts should be eliminated.

95 The Court: All right. That is all right.

Mr. Rapp: All right, fine.

Mr. Essin: May I ask another question in reference to the numbering? I don't know what the procedure thereon is going to be—

The Court: Wait a minute. What would be better?

Mr. Essin: If your Honor please, I would prefer to have them re-marked for this trial so there will be no confusion.

The Court: All right.

Mr. Essin: Otherwise we are going to have two number series which are different.

Mr. McDermott: Yes, I see what you mean.

The Court: What is that?

Mr. McDermott: Yes, you would have two number changes.

Mr. Essin: Which are different. That is why I think the brand new set of numbering for this trial would be better.

The Court: All right, we will start with number 1.

Mr. Rapp: You see, Exhibit No. 1 at the last trial, your Honor, was a newspaper that was introduced by the defense for the purpose of motion for a continuance.

The Court: What we will do with Exhibit No. 1
96 for the last trial, we will just scratch out that number 1 and give it a new number.

Mr. Rapp: That is agreeable to me.

Mr. Essin: It is agreeable to me.

Now, the third point is that the jury list that I received contained only twenty-four names. I understand that additional talesmen have been summoned?

The Court: Yes. I thought this, Mr. Rapp—and both of you, if you wanted to, you could waive some of your strikes, and it will save us bringing in a lot of extra jurors. All you want is a jury that is fair and honest, and we are

not going into any detail as to whether or not they are members of the Communist Party, or what they think about the Communist Party—I am not going to ask the jury any questions of that character at all. We are just going to try to select a jury that is fair and honest and that can give this man a fair trial and give the Government a fair trial, and if you can waive any of your strikes, you might do so. I am not asking you to do it.

Mr. Essin: I understand, your Honor. May I comment on that?

The Court: Yes.

Mr. Essin: First, in reference to waiving of strikes, based on the list which was sent to me—of course, I
97 don't know who the additional talesmen are; and I won't until they open court. However, I do not feel at this time on my client's behalf that I can waive any strikes.

The Court: No, I don't mean now, but as the selection of the jury develops, if you feel that you have got a competent jury and you may want to waive any further strikes, you may do so at that time. I am not asking either of you to waive any now. We will have enough jurors so that you will all have sufficient strikes. You will have all the strikes that the Statute requires.

Mr. Essin: Yes, I understand that.

The Court: But to expedite matters, if you at any time during the selection of the jury feel you want to waive further strikes, you may do so.

Mr. Essin: Now, your Honor, if I may also on the question of impaneling the jury, I have certain proposed additional questions to the jury panel.

The Court: All right.,

Mr. Essin: Which I understand will be given to you?

The Court: May I see those now?

Mr. Essin: They are in pencil—there are not very many—only five (submitting memorandum).

98 The Court: That will be all right.

Mr. Essin: If you can read them—or shall I?

The Court: You read them into the record now.

Mr. Essin: Of course; some of these may be duplications of those which the Court itself would ask, I don't know.

The Court: Yes.

Mr. Essin: (Reading from memorandum:)

"Do you understand that this is a criminal trial, and that the Government is required to prove that the defendant is guilty of the crime charged beyond a reasonable doubt?"

Mr. Rapp: Well, that question—

The Court: That question—wait a minute. Let me answer this—that will not be asked. Those are covered in the instructions.

Mr. Essin: (Reading:)

"If the defendant has been found by an agency of the United States Government that he was a Communist, would that prevent you from deciding fairly and without prejudice the facts in this case?"

The Court: That's fair enough, if you want that. The Court will ask that question.

Mr. Essin: (Reading:)

99 "Have you formed any opinions about Communists which would prevent you from deciding fairly and without prejudice the facts in this case?"

The Court: That's a fair question. The Court will ask that.

Mr. Essin: (Reading:)

"Have you any prejudice against an alien which would prevent you from deciding fairly and without prejudice the facts in this case?"

The Court: That's a fair question. The Court will ask that.

Mr. Essin: (Reading:)

"Have any of you been interviewed by any agent of the United States Government in connection with your being called for jury duty in this case?"

The Court: I don't think they have. We never do. That is, never permitted, as far as I know. But I will ask that question.

Mr. Essin: Those are all the questions I have. Now, I just want to check—

Mr. Rapp: May I make a statement with reference to that last question?

The Court: Yes.

Mr. Rapp: I will inform the Court that we have had no investigation made. We have caused none to be made. We have directed none to be made. So far as my office is concerned, I think it might be prejudicial to the Government.

The Court: Yes, it would be unheard of in this District. That has never been done, as far as I know.

Mr. Rapp: We have caused no investigation of the jury to be made.

The Court: No. It would be intolerable to think of one side going out and talking to the jurors.

Mr. Rapp: Well, if it is given, your Honor, I suggest that you make it on behalf of either side.

The Court: Yes, that is fair enough.

Mr. Essin: I was going to ask, your Honor, in view of the statement made by counsel for the Government, I will withdraw that last question.

The Court: That may be stricken.

Has the Government any questions they desire the Court to ask?

Mr. Essin: May I have just one moment?

The Court: Yes.

Mr. Essin: Frankly, I recollect everything of the previous trial except the manner in which strikes are made.

The Court: Here is the way we strike our jury 101 in this District: The Court interrogates the jury—

Mr. Essin: I understand.

The Court: I ask their names and occupation, and when they state that, then I ask general questions, and as to whether they know any of the attorneys, and if they are Government employees, and what other questions I think maybe you and the Court ought to know as to their qualifications as jurors. It is brief. We don't take too much time on it. We don't let the lawyers visit with the jury like they do in some jurisdictions.

Mr. Essin: I understand.

The Court: Yes.

Mr. Essin: The second part of that question was the technical manner—do we receive a box with the names, or do I just use the list presented to me?

The Court: No, as the Clerk takes the names out of the box, you write down the name of the juror.

Mr. Essin: And the seat number?

The Court: That isn't necessary. The first thing you want to do is write down the numbers, and then as they call the names, you put down the names.

Mr. Essin: I see. I was a little confused with the Circuit Court practice.

The Court: The Bailiff will hand you the list—you will

have the first strike, I presume. Who has the first strike, the defense?

Mr. Rapp: The defense.

The Court: The defense. You will have the first strike; then he hands the jury list to the Government and they make their strike and hand it back to you. And if, say, on the fourth strike the Government says "We will waive Strike No. 4" and gives it back to you, that serves the same purpose—it is equivalent to a strike.

All right.

Mr. Essin: That is all that I have, your Honor, at this time.

The Court: That is all.

103 (Thereupon the Court and counsel returned into the courtroom; and a jury was called, selected and sworn to try the issues, and the trial was begun in the presence and hearing of the jury as follows:)

(The following evidence was offered on behalf of the plaintiff:)

Mr. Rapp: Will you mark this as an exhibit? This will have to be Exhibit 3.

(Document produced by counsel is marked EXHIBIT 3 of 1-9-56 for identification.)

104 (The following proceedings were had between the Court and counsel at the bench out of the hearing of the jury:)

Mr. Rapp: I have here a document, the Hearing Officer's decisions, which was not previously introduced in the former trial.

The Court: What is it?

Mr. Rapp: It is the Hearing Officer's decisions. You see, there was a three-way deal: First, the Hearing Officer heard the facts, and he made his decision. Then there was an appeal to the Appeal Officer; and then the Appeal Board.

Now, this is the first step in the proceedings.

The Court: Does that appear in the transcript of the record, Exhibit 1?

Mr. Rapp: No, sir, this is new.

The Court: What is that?

Mr. Rapp: This is a new document.

The Court: Well, it was in evidence at the former trial, was it?

Mr. Rapp: It was in existence, but it was not introduced at the former trial. It is a part, your Honor—

The Court: What is that?

105 Mr. Rapp: It is a part of the record, that is Exhibits 1 and 2. This is Exhibit 3.

The Court: Are these proceedings included in that record (indicating)?

Mr. Rapp: Yes, sir.

The Court: That is what I asked you.

Mr. Rapp: Yes, sir— No, I thought you meant at the first trial. It is not in the first trial.

The Court: Well, what I really meant—

Mr. Rapp: It is in that, that is correct. (Indicating Exhibit 1.)

The Court: I thought it was.

Mr. Rapp: It is in that.

Mr. Essin: Your Honor, I would like a little time to go over this—

The Court: Let me see this. This is Exhibit 3?

Mr. Rapp: Exhibit 3.

The Court: Which you are now offering. Is this a part of what was formerly Exhibit 1 and Exhibit 2, which is the transcript of the record of the deportation proceedings against this defendant?

Mr. Rapp: That is correct. But I feel, your Honor—

The Court: What I thought I would do in this 106 case, as to those two exhibits which purport to be the transcript of the record of the deportation proceedings, I would later advise the jury that I have studied and examined and considered them and reviewed them pursuant to direction of the Court of Appeals; and I will then tell them what I believe that they disclose and prove.

So I don't see at this time why you want to offer this.

Mr. Rapp: Your Honor, the only thing I want to make sure is that the record is complete, by having the three proceedings.

The Court: Oh, I see.

Mr. Rapp: You see, that was introduced for the purpose of judicial review.

The Court: Oh, yes. It may be received, but not for the present for the eyes of the jury. It may be received as evidence, the same as Exhibits 1 and 2, but not to be submitted to the jury at this time.

Mr. Essin: That is the point—

Mr. Rapp: All right. May I read this section:

"That the respondent be deported from the United States pursuant to law on the following charges"—

The Court: You can read what the order was, yes.
107 Mr. Rapp: All right. And my second and third, or my fourth and fifth exhibits will be the Hearing Officer who reviewed this case, and then the final order denying the appeal; and I would like to read the short paragraph of the order in each case.

The Court: You may do so.

Mr. Rapp: Not the full—

The Court: You may do that.

Mr. Essin: My point, your Honor, the point that I wanted to raise, and why I asked counsel to come up here, was that on the motion for pre-trial discovery here, this Court asked counsel for the Government whether there were any other documents—

The Court: Now he says that this document is—

Mr. Essin: He said no.

The Court: He states now to you and to the Court that the document, Exhibit 3, is part and parcel of the documents formerly marked Exhibits 1 and 2, which were transcripts of the record and proceedings in the deportation proceedings. And this Exhibit 3 is only a part of that, and it is mere surplusage so far as the Court is concerned.

Mr. Essin: Then, do I understand that the Court will not permit any of this to get to the jury?

The Court: At this moment, no. I will receive 108 it simply for the eyes of the Court, except that the counsel may read—or you may stipulate that an Order of Deportation was entered.

Mr. Rapp: Your Honor—and that this is exactly the same document as this right here (indicating).

Mr. Essin: Well, your Honor, I will not stipulate on behalf of the defendant to any order.

Furthermore, I want to object to any part of it being read to the jury. This is the part of the record, of the Exhibits 1 and 2 which the Court was to pass upon.

The Court: Yes.

Your objection to the reading of that portion of this Exhibit 3 which is the Order of Deportation is overruled, and the United States Attorney may read to the jury that portion of this exhibit which directs his deportation, and which in fact is the Order of Deportation—without any reference to the findings upon which that Order is based.

Mr. Rapp: All right.

Mr. Essin: May I have just a moment to look at that, your Honor.

The Court: Yes, you may.

(Mr. Essin examines document heretofore marked Exhibit 3 for identification.)

109 (The following proceedings were had in the hearing of the jury:)

The Court: Exhibit 3 is received in evidence.

Mr. Essin: Subject to—

The Court: It is received over the objection of the defense.

Mr. Essin: And subject to the rulings made by this Court in reference to that exhibit?

The Court: Yes, that's right.

(Document previously so marked for identification is received in evidence as Exhibit 3; said original exhibit being certified on appeal to the Clerk of the United States Court of Appeals for the Seventh Circuit under the hand and seal of the Clerk of this Court, pursuant to rules.)

Mr. Rapp: May I state for the purpose of the record, your Honor, that this is the Hearing Officer's decision, and the Government offers it as Exhibit No. 3. Pursuant to instructions of the Court, I will read the decision, or the disposition of the Hearing Officer—dated May 4, 1951:

Disposition: That the respondent be deported from the United States pursuant to law on the following charges:

110 "The Act of May 26, 1924, in that, at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder.

"The Act of October 16, 1918, as amended, in that he is found to have been, at the time of entry, and after entry, a member of the following class set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States."

That is Exhibit 3.

This will be No. 4.

(Document produced by counsel is marked EXHIBIT 4 of 1956 for identification.)

Mr. Rapp: May it please the Court, I would like to offer Exhibit No. 4, which is the order of the Assistant Commissioner, Adjudications Decision, entered on October 8, 1951.

Colloquy.

The Court: May I see it? (Examining document.)

Mr. Rapp: And I would like to read therefrom 111 that portion of it that gives the order (indicating).

Mr. Essin: Please the Court, I would like to state my challenges on the record to that.

The Court: I beg your pardon?

Mr. Essin: If it please the Court, I would like to state my objections to that, after the Court has looked it over.

The Court: You may.

What does Exhibit 4 purport to be?

Mr. Rapp: It purports to be the record of the proceedings, that is, the findings and the order in the case of Knut Einar Heikkinen in the deportation proceedings.

The Court: You may make your objection.

Mr. Essin: Your Honor, first I would like to inquire, when counsel for the Government stated that he wanted to read such portion of it to the jury, did I understand him to mean thereby that the rest of that proposed exhibit would not be viewed by the jury?

The Court: That is right. The exhibit will be received, and it will be for the eyes of the Court, for the present, at least, except that portion which contains the Order of Deportation. And that you may read to the jury, that Order of Deportation.

Mr. Essin: And for the present, then, the balance 112 of that entire matter will not be shown to the jury?

The Court: It will be considered by the Court; it will not be submitted to the jury at this time.

Mr. Essin: At this time, or any time?

The Court: I don't know, at any time.

Mr. Essin: Oh, I see.

The Court: I haven't determined that. But at this time it will not be. Only so much of Exhibit 4 as relates to the order itself may be read to the jury. The exhibit is received.

Mr. Essin: Your Honor, I would like to state my objection for the record on that, if I may?

The Court: Yes, you may state your objections.

Mr. Essin: There are quite a few in order, and I would like to read them all, therefore, as I have them here noted.

I would first like to state as a ground in support of the objections to the admission of the proposed Exhibit 4 that there was no proper or valid or complete record before

this Court which it could review, and upon which the order is based.

There was no proper or valid record before this Court upon which a valid order or deportation was based.

The purported record of the deportation proceedings—correct that, and I will re-read:

The purported record of the deportation hearing upon which this order was based contains substitutions which vitiate the validity of said record and of the order of deportation based thereon.

Substitutions in the record of deportation proceedings relating to the defendant were made without notice to the defendant and without his consent or agreement.

The defendant was denied the right to counsel in the deportation proceedings.

The Immigration and Naturalization Service was arbitrary and capricious in denying to the defendant a place of hearing to permit him to have counsel, in violation of defendant's rights to due process.

The defendant was denied a hearing in New York City, the residence of his counsel, notwithstanding that all the Government witnesses who testified against the defendant were from New York.

The Court: Wait a minute. I don't think I want to have this in the presence of the jury. We have reviewed this before. You may submit those objections in writing, and I will hold this matter open until two o'clock,—or you can dictate those in the absence of the jury. We have passed upon that before.

114 Mr. Rapp: Please the Court, it appears to me that those are the same objections that were heard by this Court about two weeks ago.

The Court: Yes.

Mr. Rapp: And upon which the Court passed.

Mr. Essin: Your Honor, may I state on behalf of the defendant—

The Court: You may not make any further objections in the presence of this jury. I have told you that. You may make your objections—the jury may be excused, and you may proceed with your objections.

Mr. Essin: I have no objection to that.

The Court: Just a minute— Just a minute. The jury may be excused.

115 (The jury were excused from the courtroom, and the following further proceedings were had between

the Court and counsel, out of the presence and hearing of the jury.)

The Court: Now, you may continue with your objections.

Mr. Essin: Your Honor, may I state, now that the jury has gone, that I wasn't offering any argument but simply stating objections to the proposed Exhibit 4.

The Court: That is all right. I understand.

Mr. Essin: May I ask that the reporter find out the point at which I stopped?

(Former record read by reporter as follows:)

"The defendant was denied a hearing in New York City, the residence of his counsel, notwithstanding that all the Government witnesses who testified against the defendant were from New York"—

Mr. Essin: —were from New York City.

Defendant was denied due process, in that the deportation hearings were not conducted in accordance with and pursuant to the provisions of the Administrative Procedure Act, and particularly Section 1005, Subsection (a),

U.S. Code, Title 5—with particular reference to the requirement that hearings be held at the convenience and necessity of the parties in the proceedings.

The findings of deportability and order of deportation are not valid because they are not based on reasonable, substantial and probative evidence.

The findings of fact in the deportation proceedings were not supported by legally admissible evidence.

The Hearing Officer was not fair and impartial in receiving in evidence Exhibits numbered 11 to 14, inclusive, of exhibit in this trial No. 1.

The conclusions of law entered in the deportation proceedings were not supported by legally admissible evidence.

The record upon which the order is based does not show to what country the defendant was ordered deported.

The record upon which the order is based does not show that the country to which the defendant was ordered deported, if any, would receive said defendant.

The record upon which the order is based does not show that the country to which the defendant was ordered deported, if any, had issued travel documents to permit defendant's departure from this country.

Defendant's rights under the First and Fifth Amendments to the Constitution of the United States were violated.

The deportation proceeding constitutes a bill of attainder and is an ex post facto law.

The order does not show that the country to which the defendant was ordered deported, if any, had issued or will issue travel documents to permit defendant's departure from this country; and the order does not allege the country of origin of said defendant, or the country of which said defendant is, or last was a citizen, or the country to which he was ordered deported.

The order does not show that application for travel documents by the defendant would have resulted in the securing of travel documents necessary for the departure of the defendant from the United States.

The order does not show that the defendant is deportable to any country whatever, or that he could gain admittance to any country.

The order of deportation against the defendant is based on conduct antedating the effective date of the law under which this defendant is being tried; and said order is therefore violative of the United States Constitution in that it is an ex post facto law, and constitutes a bill of attainder.

Said order is violative of due process in that it, the 118 order, and the deportation hearing and proceeding upon which the order is based deprives defendant of his rights to a jury trial and the requisite forms of criminal procedure, in that it delegates to an administrative body, or purports to delegate to an administrative body the determination of the essential elements of an alleged criminal offense.

Said order of deportation, proposed Exhibit 4, results from a mere administrative proceeding, without the protective devices guaranteed to persons accused of a crime, and cannot legally form the basis of a criminal prosecution resulting in the denial of liberty.

I have concluded, your Honor, my statement of objections to the admissibility of proposed Exhibit 4.

The Court: There has been offered and received in evidence what was formerly marked Exhibits 1 and 2, which purport to be a complete transcript of the record in the deportation proceedings.

This Court has reviewed, studied, and examined that entire transcript; and the Court finds that that record—from that record, from reviewing it, that all of the provisions of the United States Statutes relating to the deportation of an alien have been strictly complied with in this case.

The defendant was given due and sufficient notice, 119 reasonable under all circumstances, of the nature of the charges against him, and of the time and of the place at which the proceedings were to be held. He was accorded the privilege of being represented by counsel, and was in fact, during the first part of the proceedings represented by counsel in New York. That he thereafter voluntarily left New York City, and departed to Superior, Wisconsin, where he resided for some time, and the hearings were held in Duluth for his convenience.

He was given, by the Government agency conducting the deportation proceedings against him, every opportunity to employ counsel; and that, as I recall from reading that transcript, at least on two occasions those in charge, the Government agency in charge of the deportation proceedings continued the hearing for, I think in one instance, about three weeks, as I recall, to give him an opportunity to employ counsel. He steadfastly refused, and insisted that he wanted his attorneys from New York, who steadfastly refused to come out to Duluth to participate in the proceedings.

That in a part of the proceedings, the Court finds that he did engage a lawyer from Minneapolis to represent him. But he was accorded every opportunity to engage counsel and to be represented by counsel throughout the entire hearing, and that he refused.

120 I have made a few notations on this that I think—

He had a reasonable opportunity to examine the evidence against him, and to present evidence in his own behalf, and to cross-examine the witnesses presented by the Government. That all appears from the transcript of that record.

The order of deportation was and is based upon reasonable, substantial, and probative evidence, and is valid.

And your motion, and your objections are overruled.

Now, we will take a recess until two o'clock. And that is a statement that I shall make to the jury, that I have reviewed the record of the deportation proceedings, and find

that due process has been complied with, and that the order is valid.

Mr. Essin: Your Honor, may I after the recess, after lunch and before the jury is called in again, go over in detail the elements in the deportation proceeding—

The Court: I have reviewed that, and you have reviewed it, and nothing that you may say to me now will in any way change my opinion as to my findings on the record of the deportation proceedings.

I find that at every step the United States Statutes 121 have been complied with; he has had a fair hearing; he had an opportunity; he had due notice, and he had opportunity to be represented by counsel; he had opportunity to cross-examine; he had opportunity to examine all the evidence in this case, and I am without any doubt in my own mind the order of deportation is valid, and the only question before this Court, and for this jury to consider is whether he complied with the directions to leave the country within the six months period.

We will take a recess until two o'clock.

(At 12:00 o'clock noon, a recess was taken until 2:00 o'clock in the afternoon of the same day, Monday, January 9, 1956.)

122 (The trial was resumed on Monday, the 9th day of January, 1956, at 2:00 o'clock in the afternoon, pursuant to recess.)

Counsel Present:

Mr. Rapp,
Mr. McDermott,
Mr. Essin.

The defendant, Knut Einar Heikkinen, was present in person.

The Court: The jury may be excused.

(Whereupon the jury were excused from the courtroom, and the following proceedings were had between the Court and counsel, out of the presence and hearing of the jury:)

123 The Court: Let the record show that the exhibits that have been heretofore marked Exhibits 1 and 2 during the preliminary motions in this matter are now marked Exhibits 5 and 6 and will be so referred to herein.

And those are the certified copies of the record of the deportation proceedings.

I take it, Mr. Essen, your objection that you read into the record applied to both Exhibits 3 and 4, or simply to Exhibit 4?

Mr. Essen: May I just for a moment check my notes on that? 3 and 4.

The Court: 3 and 4.

I think I had better elaborate a little for the record.

The statement made by defendant's counsel in support of his objection to the reception of Exhibits 3 and 4 is replete with misstatements of fact and law; and the Court therefore deems it necessary to enlarge somewhat more in detail on a statement made prior to adjournment this noon, as to its findings after reviewing the record in the deportation proceedings.

On November 10, 1949—The court now makes this statement and these findings, after further review of its notes on the examination and review of the record on the deportation proceedings.

124 On November 10, 1949, the warrant of arrest was issued against the defendant.

On November 21, 1949, the defendant was served with a copy of the warrant of arrest at Yonkers, New York. At the time the defendant was served with the warrant of arrest, he was informed as to the cause of his arrest, and advised as to his right of counsel. That is shown on the reverse of the warrant of arrest in this Exhibit 1.

On January 9, 1951, the defendant was informed that a deportation hearing would be accorded him on January 30th, 1951, at the Post Office Building in Duluth, Minnesota. The charges outlined in the warrant of arrest were recited in the notice; and he was further and again informed of his right to be represented by counsel of his own choosing. A notice of appearance on Form G-28, dated January 23rd, 1951, was received from defendant's counsel, Isadore Englander, on January 25th, 1951. Together with the notice of appearance there was received a letter from Mr. Englander to the effect that it was impossible for Mr. Englander to go to Duluth to represent the defendant, nor would it be possible in the near future to do so. Mr. Englander further requested that the hearing be transferred to New York City.

On January 25th, 1951, Mr. Englander was notified

125 by the Immigration and Naturalization Service that it had received his letter of January 23, 1951, and that a hearing had been scheduled for ten o'clock A. M. on January 30th, 1951, at Duluth, Minnesota.

On January 30th, 1951, deportation hearing was started in the Post Office Building in Duluth, Minnesota; and the Hearing Officer again advised the defendant of his right to counsel. Whereupon the defendant stated that Mr. Englander was his attorney, and that said attorney had advised the Immigration Service that he would not be present at the hearing. Defendant further stated that he had forwarded the notice of hearing to Mr. Englander, and that he had received information to the effect that Mr. Englander could not attend the hearing. He further said that he desired to be represented by Mr. Englander, and he requested a continuance to arrange for his attorney to appear.

And there, on that date, January 30, 1951, the deportation hearing was continued to March 1st, 1951, and the defendant was informed that he should be prepared to proceed with the hearing on that date.

On February 2, 1951, a copy of the transcript of the hearing of January 30, 1951, was forwarded to Mr. Englander, and Mr. Englander was informed that if he did not appear on March 1st at the hearing, that the 126 Government would request the Hearing Officer to proceed with the hearing.

On February 6, 1951, Mr. Englander, in response to the letter of February 2nd, 1951, acknowledged receipt of the transcript of the hearing on January 30th, 1951, and stated his desire to continue to represent the defendant, but stated that it would be impossible to travel to Duluth in the foreseeable future, and requested that the hearing be transferred to New York.

Of course, at that time the trains were running, and the airplanes were running, and it was just a few hours' ride from New York to Duluth. And the Court is of the opinion that the action and conduct of Mr. Englander was simply dilatory tactics to continue and postpone indefinitely this hearing.

On February 8th, 1951, Mr. Englander was informed by the Immigration and Naturalization Service that the transfer of the case would not be made, and that the hearing would be held in Duluth on March 1st, 1951, as scheduled. He got that notice on February 8, 1951.

On February 13, 1951, Mr. Englander, in replying to the Government's letter of February 8, 1951, protested the failure to transfer the case to New York, and stated that Mr. Heikkinen would not be represented by any attorney, and that any further hearings accorded to the defendant 127 would constitute denial by due process.

On February 16, 1951, the Hearing Officer informed Mr. Englander that the hearing on Mr. Heikkinen's case would proceed on March 1st, 1951, and a copy of this letter was forwarded to the defendant.

128 On March 1, 1951, the Hearing Officer, after reviewing the correspondence with Mr. Englander and the Immigration and Naturalization Service, proceeded with the hearing.

A summary of the evidence on the hearing is as follows:

The defendant testified at the deportation hearing that he was a member of the Communist Party of the United States between 1922 and 1930.

Leonard Patterson, a witness for the Government, testified that he was a former member of the Communist Party from 1930 to 1937, and that he attended the International Lenin School, in Moscow, in 1931 and 1932, and during that time he met the defendant at a meeting of the Communist Party held in the dormitory of the Lenin School. The witness testified that it was not possible for anyone to attend this gathering who was not a member of the Communist Party.

Another witness, Ralph Dabracchio, a New York City fireman, testified that in the spring or summer of 1947, he took care of the building where the defendant resided; that while in the defendant's apartment, he examined some books in the defendant's book case, and during the examination of such books a card fell to the floor, bearing the defendant's name and showing membership in the 129 Communist Party.

There was also introduced into evidence the testimony of the defendant before the United States District Court for the District of Minnesota on November 10, 1950, in the case of United States, ex rel. Knut Einar Heikkinen versus Harry Gordon, wherein the defendant admitted membership in the Communist Party of the United States between 1922 and 1930; that he had resided in the Soviet Union for approximately three years, from 1932 to 1935; that he had returned to the United States without obtain-

ing official passports, and that his "was not an ordinary or legal form or entry or exit."

The Court now therefore finds that the deportation order is supported by reasonable, substantial, and probative evidence.

I further find that the defendant was accorded due process before the Immigration and Naturalization authorities; and that the rules and regulations of the Immigration and Naturalization Service were adhered to, and pertinent statutory provisions duly followed. The defendant was granted a reasonable period of time after the service of the warrant of arrest, within which to arrange for the presentation of his case, including representation by counsel. He was further given reasonable 130 notice of the nature of the charges against him, of the time and place at which the proceedings would be held, and was informed of his privilege of being represented by counsel.

Defendant was given more than an ample opportunity to be represented by counsel. He had a reasonable opportunity to examine the evidence produced against him, to present evidence on his own behalf, and to cross examine witnesses presented by the Government; and, as stated before, the Court finds that the order of deportation is based upon reasonable, substantial and probative evidence, and is valid.

The Court again overrules the defendant's objection to the reception of Exhibits 3 and 4, and they will be received for the limited purpose as I have heretofore stated.

Mr. Essin: If it please the Court, I don't mean to go into extended comment—

The Court: What is that?

Mr. Essin: I have no intention, your Honor, of going into any extended comment on the findings just made of the Court. I would however, like to refer to one point which is not included in the summary made by the Court as to the proceedings had in reference to the defendant, that is, the proceedings in the deportation proceed- 131 ing.

Now, the Court, in the early part of the statement made by the Court, referred to the warrant of arrest having been served upon the defendant in the deportation proceedings on November 21, 1949.

Now, that Exhibit No. 5 and 6, that is the new numbers 5 and 6—show that he had a hearing, a deportation hear-

ing in New York; and at that time his attorney, the defendant's attorney was Mr. Isadore Englander. And that is clear from that record.

Now, if the defendant had never had an attorney prior to the time of the hearings in Duluth, then I would grant that he comes to court raising this challenge with poor grace. But here is a proceedings which began in 1949; the hearing was held in New York in 1949; in 1949, Mr. Englander was his attorney, and he represented him in the proceedings then. And then, due to the decision in the *Sun versus McGrath*, not the proceedings, but just the hearing was set aside in 1949—not the entire proceedings—and the *Sun versus McGrath* case referred to the fact that in all those proceedings the deportee, or the prospective deportee, or the alien, whatever he may be called, is entitled to a hearing *de novo*, not a new proceedings.

Now, Mr. Englander had been his attorney, and had 132 participated in the deportation hearings.

The Court: Let me say to you, Mr. Englander nor you nor any other lawyer can hold up Government proceedings for months and months; when there are thousands of other lawyers available, and the transportation facilities between New York and Duluth were operating at this time. He could have gotten out there.

Mr. Essin: Your Honor, it wasn't a question—

The Court: Englander's actions were dilatory, there is no question about that, and that is part of the defendant's tactics—they were trying to delay proceedings just as long as they could, and the authorities have been very, very considerate.

Mr. Essin: But, your Honor—

The Court: I don't think we will discuss it any further. I have made my ruling. That's it.

Bring the jury down.

Mr. Rapp: Your Honor, if I might just call your attention to one thing—if you remember these exhibits as 5 and 6, we will not have an Exhibit 1 and 2 in this matter.

The Court: Well, what will be a convenient number for these?

Mr. Rapp: 1 and 2.

Mr. Essin: I would agree with that, your Honor.

133 The Court: What was that?

Mr. Essin: I would agree with that—that if those exhibits are renumbered,—

The Court: Let me see those exhibits. (Examining exhibits.)

Those were originally marked Exhibits 1 and 2, and they shall remain Exhibits 1 and 2.

Mr. Rapp: Thank you.

The Court: There was some discussion in the Court chambers about renumbering them, and I was going along with that; but there is no need to add confusion to confusion.

The record may show that those exhibits are still Exhibits 1 and 2; and the reference of the Court to marking them as Exhibits 4 and 5 is stricken.

Mr. Essin: A correction, your Honor: 5 and 6 was your statement, I believe.

The Court: What is that? 5 and 6, yes. That is stricken; and the original numbers of 1 and 2 are attached to those exhibits, and shall remain.

134 (Thereupon the jury were returned into the courtroom; the trial was resumed and the following further proceedings were had in the presence and hearing of the jury:)

Mr. Rapp: Continuing where we left off, your Honor, I just wanted—I have forgotten whether or not I had offered this exhibit, dated October 8, in the matter of Knut Einar Heikkinen, in deportation proceedings. It has been marked Exhibit 4 in evidence, and I propose to introduce it in its entirety at this time, and propose to read, in accordance with your prior instructions, just the order.

The Court: You have already offered that, and the defense has made its objection to it, and that is what all this discussion has been about.

Mr. Rapp: Yes, sir.

The Court: And the Court has overruled his objections, and the Exhibits 3 and 4 are admissible for the limited purposes we have indicated.

Mr. Rapp: Yes, sir.

The Court: And you may read to the jury that portion of it which pertains to the order of deportation.

Mr. Rapp: Yes, sir. (Reading from Exhibit 4):

“Order: It is ordered that the alien be deported from the United States, pursuant to law, on the following 135 charges:

“Immigration Act of May 26, 1924, in that, at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder;

"The Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class set forth in Section 1 of said Act: 'An alien who was a member of the Communist Party of the United States.'"

And it is made by the Assistant Commissioner, Adjudications Division of the Department of Immigration and Naturalization.

Will you mark this?

(Documents produced by counsel is marked EXHIBIT 5 of 1 9/56 for identification, and submitted to Mr. Essin for inspection.)

136 Mr. Rapp: May it please the Court, I offer at this time Exhibit No. 5, which purports to be the findings of the Appeal Board from the order entered in Exhibit No. 4, in its entirety. (Presenting Exhibit 5 to the Court.)

The Court: Any objection?

Mr. Essin: Your Honor, the objections to the admission of Exhibit No. 5 are the same as those I have made to Exhibits No. 3 and 4.

The Court: Your objection is overruled. Exhibit 5 may be received.

Mr. Rapp: May I read the order?

The Court: You may read the pertinent part, yes.

Mr. Essin: Pardon me, Mr. Rapp, before you begin.

Do I understand that the reading to the jury is only the order of Exhibit No. 5, and ruling as to whether the rest of it will be submitted to the jury is reserved, as in the other exhibits?

The Court: That is right. Only refer to the order part. Don't make any comment on the findings at all. The Court will take care of that later.

Mr. Rapp: Yes, sir.

137 (Document previously so marked for identification is received in evidence as Exhibit 5; said original exhibit being certified on appeal to the Clerk of the United States Court of Appeals for the Seventh Circuit under the hand and seal of the Clerk of this Court, pursuant to rules.)

Mr. Rapp: This matter is entitled:

"File: A-4316699.

"In re: Knut Einar Heikkinen.

"In Deportation Proceedings."

The order is:

"It is ordered that the appeal be dismissed."

138 Mr. Rapp: I would like to call Mr. Harry Gordon.

HARRY GORDON, called as a witness on behalf of the plaintiff, and having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination by Mr. Rapp.

Q: What is your full name, sir?

A. My name is Harry Gordon.

Q. During the year 1952, what was your occupation?

A. I was the officer in charge of the Immigration and Naturalization Service at Duluth, Minnesota.

Q. As officer in charge of that office, did the territorial limits include Superior, Wisconsin?

A. It did.

Q. Are you familiar with the deportation case entitled Knut Einar Heikkinen?

A. I am.

Q. Now, during the month of April, 1953, were you notified of an order of deportation being entered against Knut Einar Heikkinen?

A. I was.

139 Mr. Rapp: Mark this, please.

(Document produced by counsel is marked EXHIBIT 6 of 1/9/56 for identification, and submitted to Mr. Essin for examination.)

Mr. Rapp:

Q. Mr. Gordon, upon notification of the order of deportation being entered in the matter of Knut Einar Heikkinen, did you have a duty to perform?

The Witness:

A. I did.

Q. And will you state to the Court and to the jury what that duty consists of?

A. It was my duty to inform him of the receipt of the order, and to notify him concerning his rights and duties.

Q. And did you do so?

A. I did.

Q. How did you do that?

A. I sent him a letter by Registered mail, addressed to him at Superior, Wisconsin, at his home address.

Q. I show you what has been marked Exhibit No. 6, and ask you whether or not that is a copy of that letter?

140 A. Yes, that is a copy of the letter.

Mr. Rapp: I would like to offer Exhibit 6 into evidence at this time, your Honor.

The Court: Any objection?

Mr. Essin: Yes, objection is made to the admission of Exhibit No. 6, on the same grounds that have been made to Exhibits No. 3 and 4, since it is related to and flows from the Exhibits 3 and 4.

The Court: Objection overruled. It may be received.

Mr. Rapp: I am going to ask him to read that exhibit.

The Court: Yes, you can read all of it, except what the Court has stricken. (Indicating.)

(Document previously so marked for identification, is received in evidence as Exhibit 6; said original exhibit being certified on appeal to the Clerk of the United States Court of Appeals for the Seventh Circuit under the hand and seal of the Clerk of the Court, pursuant to rules.)

141 Mr. Rapp:

Q. Now, as officer in charge, just for the mechanics of this, does this letter bear any indication as to whether it was sent by Registered mail?

The Witness:

A. Yes, it does.

Q. Does it bear a Registry number?

A. It bears a Registry number, No. 32,114, and the statement:

"Registered Mail—Restricted to addressee. Return receipt requested."

The Court: Was it sent by Registered mail?

The Witness: It was.

Mr. Rapp:

Q. Will you read that letter to the jury, Mr. Gordon?

The Witness:

A. This is Form I-229, and it is headed:

United States Department of Justice
Immigration and Naturalization Service
333 Post Office Building
Duluth 2, Minnesota.

Date: April 30, 1952

File No: A4-316 699 T

±32114

Registered Mail — Restricted
To Addressee

Return Receipt Requested."

142 And it is addressed to:

Mr. Knut Einar Heikkinen,
603 Tower Avenue
Superior, Wisconsin,

"Dear Sir:

"An order, of which you have been notified, directing your deportation from the United States was entered on April 25, 1952, on the following grounds:

"The Immigration Act of May 26, 1924, in that, at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder; and

"The Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.'"

End of quotation.

Q. May I interrupt just one second? You are coming to a portion that is crossed off. Do not read that portion.

The Court: He won't be able to. It was scratched out so he couldn't read it.

The Witness:

143 A. (Reading):

"Arrangements to effect your deportation pursuant to such order are being made and when completed you will be notified when and where to present yourself for deportation.

"In this connection you are reminded that Section 23

of the Internal Security Act of 1950, which was enacted by Congress on September 23, 1950, declares that any such alien 'who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of' that Act 'whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony. Provided, that this subsection shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: * * *

End of quotation,—and some asterisks before that.

"Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950.

"Very truly yours,"

And signed, "Harry Gordon, Officer in Charge."

Mr. Rapp:

Q. You are the Harry Gordon that signed that document?

A. I am.

Q. And at your direction it was sent by Registered mail to Knut Einar Heikkinen, who is the defendant in this 145 action?

A. It was.

Mr. Rapp: Will you mark this, please?

(Document produced by counsel marked EXHIBIT 7 of 1-9-56, for identification.)

Mr. Rapp:

Q. Was a return receipt prepared in your office, and at your direction, and mailed with that letter?

The Witness:

A. It was.

Q. I show you what has been marked Exhibit 7, and ask you if that is the return receipt which was prepared in your office and sent with the Registered letter to Mr. Heikkinen?

A. It was.

Mr. Rapp: I would like at this time, your Honor, to offer Exhibit No. 7 in evidence.

Mr. Essin: Your Honor, we have objections to the admission of proposed Exhibit No. 7:

First, on the same grounds, since it is related to a purported instrument which in turn is related to Exhibits 3

and 4; on the same grounds, therefore, as were raised 146 on 3 and 4. And also on the ground that the date—

may I have a look at that, please, for just a moment? (Examining exhibit.) The date indicated for delivery is blurred, and there is no way of knowing from this card when it was delivered.

The Court: I show you Exhibit 5—is this?

Mr. Rapp: No, Exhibit 7, your Honor.

The Court: Exhibit 7, and ask you if that is the return card you received from Mr. Heikkinen after you sent that notice?

The Witness: Yes, that's the card.

The Court: Does his signature appear on the back of it (indicating)?

The Witness: It does.

Mr. Rapp: Let me ask you—Well, let me check, first—Has this been received in evidence?

The Court: It is received. Objection overruled. It is received in evidence.

(Document previously so marked for identification is received in evidence as Exhibit No. 7.)

(Said original Exhibit 7 being certified on appeal to the Clerk of the United States Court of Appeals for the Seventh Circuit under the hand and seal of the Clerk of this Court, pursuant to rules.)

147 Mr. Rapp:

Q. You are familiar with Knut Einar Heikkinen, are you?

The Witness:

A. I am.

Q. Have you seen documents subscribed by him?

A. I have.

Q. Do you know his signature?

A. I do.

Q. I ask you if that (indicating) is the signature of Knut Einar Heikkinen?

A. It is.

The Court: That appears on that exhibit?

Mr. Rapp:

Q. That appears on Exhibit 7 (indicating)?

The Witness:

A. Yes, that is his signature.

Q. And it is on the return receipt, indicating "Received from the Postmaster the Registered or Insured article, the origin number of which appears on the face of this Card." And then his signature. Is that correct?

A. That is correct.

Q. I ask you whether or not that card is numbered?

A. That card is numbered—on the face, and bears the stamp that was prepared in our office:

148 "U. S. Immigration and Naturalization Service, 333 New P O Building, Duluth, Minnesota."

Q. That is your address?

A. That is our address in Duluth.

Q. Yes, sir.

A. And it bears the Registered article No. 32114.

Q. And is that the same corresponding number as the letter?

A. It is.

Q. I ask you whether or not that has a post mark on it?

A. It has.

Mr. Essin: Hold it, Mr. Gordon. I object to further questions along this line. The document is in evidence, and it speaks for itself.

The Court: Objection overruled.

Mr. Rapp:

Q. Will you state the date and place of that post mark?

The Witness:

A. There is a postage stamp—or postal stamp:

"Superior, Wisconsin, May 1, 1952, 7 P.M.," and the cancellation stamp of the Post Office Department.

Mr. Rapp: Yes.

The Court: You may hand it to the jury.

149 (Exhibit 7 is handed to the jury for inspection.)

Mr. Rapp:

Q. And that was received at your office, was it not?

The Witness:

A. It was received in our office.

Q. It is the card that was sent accompanying the letter?

A. It was the card which accompanied this letter.

Q. That letter is dated, is it not, Mr. Gordon?

A. That letter is dated, yes.

Q. And what is the date on that?

A. April 30, 1952.

Q. It was sent on that date?

A. It was sent on that date.

Q. Yes. And at the time, to the best of your information, did Knut Einar Heikkinen reside in Superior, Wisconsin?

A. He did.

Q. At what address?

A. At 603 Tower Avenue, in Superior, Wisconsin.

Q. And how far is that from your office, to the Duluth Immigration and Naturalization office?

A. Well, Duluth and Superior are contiguous cities—about five miles from Duluth across the bay.

The Court: Is there a bus service between the two cities?

The Witness: There is bus service between the two cities.

Mr. Rapp:

Q. Did you know Mr. Heikkinen's occupation?

The Court: Just a minute.

You say the western limits of—or the difference between the west limits of the City of Superior and the east limits of the City of Duluth is five miles?

The Witness: I believe it is approximately five miles—across the bay.

The Court: That bay isn't five miles wide.

The Witness: Well, I haven't measured it.

The Court: Nevertheless, the cities are practically together, aren't they?

The Witness: Yes, they are practically together, just go across the bridges.

The Court: They call them the Twin Cities, don't they?

The Witness: Twin Cities, yes.

Mr. Rapp:

Q. During the year 1952, Mr. Gordon, did you know the occupation of the defendant, Knut Einar Heikkinen?

151 The Witness:

A. I did.

Q. And what was that?

Mr. Essin: Hold that, Mr. Gordon, please.

I object to that question as not material to the issues involved in this case.

The Court: Overruled. You may answer.

Mr. Rapp:

Q. Will you answer, please?

The Witness:

A. He was an associate editor of a newspaper printed in the Finnish language at Superior, Wisconsin, known as Tyomies, T-y-o-m-i-e-s—Etteenpain, E-t-t-e-e-n-p-a-i-n, I believe is the way it was spelled.

Mr. Essin: Your Honor, I object to the answer, and move that all of the answer be stricken, except the identification of the defendant's occupation.

The Court: Objection overruled, and your motion is denied.

Mr. Rapp: I believe that is all.

152 *Cross-Examination by Mr. Essin.*

Q. Mr. Gordon, in 1952, you related in your direct examination, you were officer in charge of the Immigration and Naturalization Service with offices in Duluth, is that it?

A. Yes.

Q. For how long a period of time had you been officer in charge in Duluth?

A. From 1943.

Q. Until when?

A. Until December 1st, 1955.

Q. Are you still employed by the Immigration and Naturalization Service?

A. I retired on December 1st, 1955.

Q. I see. Now, when did you first get to know the defendant, Knut Einar Heikkinen?

A. About 1950.

Q. About 1950, is that the time of the deportation hearing, is that it?

A. Well, when he was taken into custody at Superior, Wisconsin, by me, under a warrant of arrest.

Q. And how often had you seen Heikkinen since the time you first saw him in 1950, after that time until six 153 months after April 9, 1952?

A. Well, before the warrant of deportation, I saw him a few times. I don't recall seeing him after the warrant, or the order of deportation was issued. During the six months period.

Q. So you don't recall seeing him at any time after April 9, 1952, is that it?

A. Well, I saw him after, but I mean not during that six months period, up to the—

Q. I see. Now, you have testified to, and have read Exhibit No. 6, have you not, the letter dated April 30, 1952?

A. I have.

Q. And that is your signature at the bottom of the letter, is that it?

A. It is.

Q. Now, did you compose this letter, Mr. Gordon?

A. What is inserted in this form letter I composed, or had inserted.

Q. By "inserted", you mean there are two kinds of printing or typing in the letter, is that it?

A. Yes; one is mimeographed and the other is typewritten.

Q. I see, and did you compose the mimeographed portion of the letter?

154 A. No.

Q. Were you familiar with its contents?

A. Yes.

Q. Before you signed the letter?

A. Yes.

Q. That is, familiar with all the contents, both the part that you inserted and the part that was mimeographed?

A. I was.

Q. And you were thoroughly conversant with the purposes of this letter, is that right?

A. Yes.

Q. Now, I refer you to the fourth paragraph of Exhibit No. 6, which appears to be the first mimeographed

paragraph after the typed-in paragraph (indicating); and would you read that, please?

A. (Reading.) "Arrangements to effect your deportation pursuant to such order are being made and when completed you will be notified when and where to present yourself for deportation."

Q. Now, what arrangements were being made to effect Mr. Heikkinen's deportation?

A. I don't know.

155 Q. But you stated, did you not, Mr. Gordon, that you were conversant and fully aware of the purpose of this letter?

A. Yes.

Q. But you say you don't know what arrangements were being made?

A. Not of my own knowledge.

Q. Who were making the arrangements referred to in that letter?

Mr. Rapp: Please the Court, he has said that he doesn't know.

The Court: What do you mean— Well, he may know. Who, if you know, who was making what arrangements were necessary?

The Witness: I don't know what arrangements were being made, of my own knowledge.

Mr. Essin: I am sorry, Mr. Gordon, that wasn't my question.

Q. My question was: Who was making, or who were making the arrangements referred to in that paragraph?

The Witness:

A. I don't know.

Q. You don't know. Now, when you signed that letter, Mr. Gordon, you understood from this mimeographed 156 portion (indicating) that arrangements were being made somewhere, is that it?

A. Well, this is a form letter, and it was— That was prepared and sent out. It was—

Q. Well, where was— I am sorry. Go ahead and finish.

A. It was the same form letter that is used in many cases that we handle in subversive, narcotics, immoral and other cases of that kind, as required by the regulations.

Q. Where did this mimeographed form come from, do you know?

A. It was furnished our Service in accordance with the usual practice, by the District Director of Immigration and Naturalization at Chicago, Illinois.

Q. And do I understand correctly that you just received—or your office received a batch of these forms to be used on appropriate occasions?

A. That's right.

Q. And when the insertions were made by typewriter on the mimeographed form, and you signed the letter to be mailed, you understood that all parts of this letter had equal effect, is that it?

A. Well, I presume so.

Q. And that when you signed the letter which 157 included the statement to the effect that arrangements were being made to effect Mr. Heikkinen's departure, that such arrangements were being made. Is that right?

A. Well, I don't know of my own knowledge.

The Court: What arrangements, if any, are made for the defendant in deportation proceedings by the Government, if any?

The Witness: Well, as far as I know, ordinarily action is taken after a warrant of deportation, with a view to deportation, but exactly what was done at that time I don't know, because it was not within my jurisdiction. I had nothing to do with it.

Mr. Essin:

Q. Well, from your experience as an official of the Immigration and Naturalization Service, and from your—I would assume—broad knowledge of the operations of the Immigration and Naturalization Service, when you say that action was being taken, what, from your knowledge and experience as an Immigration official was being taken by way of action?

Mr. Rapp: May it please the Court, I will object to that question in the first place as too broad as to any 158 particular case. It isn't specific, and what happens in other cases is immaterial, and I don't know that there is a normal case—it is immaterial to this particular case.

The Court: Well, when I asked that question, I thought he may have had some knowledge of what the usual practice was.

But do you know now of any arrangements being made in Heikkinen's case for his departure?

The Witness: No, I don't.

The Court: By the Government?

The Witness: I don't know of the actual arrangements. Whatever would be otherwise would be just merely an opinion of mine.

The Court: It was your duty just simply to give a notice to him, such as you gave?

The Witness: My duty was to give the notice.

The Court: I understand you had no part in the deportation proceedings which finally ended in the order of deportation?

The Witness: No.

Mr. Essin:

Q. Now, I will refer you to—perhaps I should show 159 it to you for purposes of clarification (submitting exhibit to the witness)—that part of the mimeographed portion beginning with “‘or who shall’” (indicating) and read it to the word, and including the word “conviction.”

The Witness: Do you wish me to read it again?

Mr. Essin: Yes.

The Witness:

A. (Reading): “‘—or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation’”—

Mr. Essin:

Q. All right. You may stop there.

Now, in reference to the portion of Exhibit No. 6, Mr. Gordon, which you read, since you first came to know Heikkinen, did he at any time fail or refuse to present himself for deportation at the time and place required by the Attorney General?

A. No, he did not.

The Court: Read that question, will you? I don't think I got that.

160 (Last question read by reporter as follows:)

“Now, in reference to the portion of Exhibit No. 6, Mr. Gordon, which you read, since you first came to know Heikkinen, did he at any time fail or refuse to present himself for deportation at the time and place required by the Attorney General?”

The Court: What is your answer to that? Did he fail, did he refuse to present himself for deportation?

The Witness: He did not.

Mr. Rapp: Please the Court, I would like to interpose objection to this question because it presupposes that the Attorney General had designated a place for his—for him to appear for deportation. And that is not the fact. There has been no testimony with reference to that fact. The Attorney General did not at any time designate a place for him to appear to be deported.

The duty devolves on the citizen himself—or the alien himself, to depart, and to procure necessary travel documents—not the Immigration and Naturalization Service, not the Attorney General of the United States, or any other officer of the Government.

Mr. Essin: Your Honor, I object to the argument on the law at this point.

The Court: He has made his statement. He has made this statement. Let me ask this witness a question:

Have you any knowledge as to whether or not he failed to depart from this country within the six months?

The Witness: Yes, I have.

The Court: Did he depart, or did he not?

The Witness: He did not.

The Court: Do you know that of your own knowledge?

The Witness: Yes, I know that of my own knowledge. He could have departed. But he didn't.

Mr. Essin: Your Honor, I move that the last statement be stricken as not being responsive, and completely uncalled for by the question asked by the Court.

The Court: Objection overruled.

Mr. Essin:

Q. Now, Mr. Gordon, on any occasion since you first saw Mr. Heikkinen in about 1950 and thereafter, did you or did any employee of the Immigration Service working under your supervision inform the defendant that there was a country to which he could go?

Mr. Rapp: If it please the Court, I object to that question because it again presupposes that Mr. Gordon knew what every single one of the agents under his department was saying to Mr. Heikkinen, and it certainly is objectionable on hearsay grounds.

The Court: Objection sustained.

Mr. Rapp: If it is limited to Mr. Gordon, I have no objection to the question.

The Court: What was that?

Mr. Rapp: If it is limited to Mr. Gordon's conferences with the defendant, I have no objection to the question.

The Court: Do you want it answered in that respect, with that limitation?

Mr. Essin: Well, I will rephrase my question, your Honor.

Q. Mr. Gordon, did you at any time inform Mr. Heikinen that there was a country that was ready to accept him—that is, a country other than the United States 163 that was ready to accept him?

The Witness: Do you mean at any time?

Mr. Rapp: Yes, at any time.

Mr. Essin:

Q. At any time after 1950—during 1950 and thereafter.

The Witness:

A. Yes.

Q. When?

A. Well, I had a Canadian passport that was presented to him, showing that he was a citizen and could have proceeded to Canada.

Q. Now, Mr. Gordon, isn't it true that that Canadian citizenship was canceled by the Canadian Government?

A. Yes, but that was later. Not at that time.

Q. It was all in a matter of a few days, as a matter of fact, was it not?

A. No, it was not.

Q. Now, what was the approximate date—

The Court: How long after— Just a minute. How long after the time that you presented his passport, or his Canadian passport was it that it was canceled?

The Witness: I do not recall the exact time. I believe it was approximately a month, or more.

The Court: So that he had ample time to walk 164 across the border, the boundary line into Canada?

The Witness: Yes.

The Court: During that month?

The Witness: Yes.

The Court: And he had passports for Canada?

The Witness: He had a passport for Canada, recognizing him as a citizen of Canada.

Mr. Essin:

Q. Now, you are aware, are you not, Mr. Gordon, that there were proceedings instituted in Canada to void the defendant's Canadian citizenship, because of non-residence in Canada for a good many years?

The Court: If it is simply hearsay—unless you know or participated in those proceedings, we don't want you to tell what someone else told you.

The Witness: I did not participate in those proceedings.

Mr. Essin: Your Honor, that isn't an answer to my question.

The Court: Do you have any personal knowledge of it?

The Witness: Except from what was told to me 165 by him.

The Court: What Heikkinen told you?

The Witness: What Heikkinen told me.

Mr. Essin:

Q. Well, didn't Mr. Heikkinen tell you that the Canadian Government instituted proceedings to void his Canadian citizenship because of his long period of non-residence in Canada?

The Witness:

A. Well, that was quite a long time after he had presented the passports to me. I have the passports in my possession.

Q. And wasn't it about that time that Heikkinen informed you that the Canadian Government was moving, and was proceeding to cancel or void his Canadian citizenship because of his years of non-residence?

The Court: He just said it was quite a long time after Heikkinen presented him with the passports. That was your answer, wasn't it?

The Witness: That's right.

Mr. Essin: Your Honor, the witness himself said a month, which is not a long time.

The Court: He just said it was quite a long time after the defendant presented you with his passports to 166 Canada that he notified you that the passport had been canceled?

The Witness: Well, I do not remember the exact time.

Approximately a month, or perhaps longer. I can't recall now.

Mr. Essin:

Q. And perhaps also shorter, too?

The Witness:

A. No, it was quite a long time after.

Mr. Rapp: May it please the Court, I would object to this line of questioning on the ground, first, that there is no time specified in this, as to these transactions. And further, that there is no showing that it is within the six months period, which is the critical period and the period that we are concerned with in this indictment, after April 30, 1952—April 9th, I am sorry.

The Court: Have you any way of fixing the date when the passport was canceled?

The Witness: Well, that was a considerable time after the six months period had expired. He asked— Mr. Essin asked me if at any time, and I mentioned that that was 167 the time when presented it; but not during that time.

I did not see him at all during that time that I can recall.

The Court: Do you mean it was after the six month period had expired?

The Witness: After.

The Court: From the time he got the notice of the order of deportation, that he came to you with the Canadian passport?

The Witness: Yes, quite a long time after.

Mr. Essin:

Q. During the six months period between, or after April 9, 1952, you didn't see him at all, during that specific period?

The Witness:

A. No.

Q. Is that right?

A. Not that I can recall.

Q. Now, did you direct any of your subordinates in 1952, after April 9, 1952, to interview the defendant in reference to the possibility of leaving the country?

A. Do you mean at any time?

Q. No, no, Mr. Gordon. I specifically—

A. Oh, during the six months period?

Q. I specifically said within six months after April 168 9, 1952.

Mr. Rapp: May I suggest the question be reread to the witness, please—or request it? Will you read the question?

(Pending question read by reporter, as follows:)

“Now, did you direct any of your subordinates in 1952, after April 9, 1952, to interview the defendant in reference to the possibility of leaving the country?”

Mr. Rapp: Do you understand the question, Mr. Gordon?

The Witness: Yes, I believe I understand the question.

A. I don't recall that I instructed any subordinates to interview him relative to leaving the country.

Mr. Essin:

Q. Well, then, Mr. Gordon, did you instruct any of your subordinates to interview Mr. Heikkinen at any time within the six month period beginning April 9, 1952?

A. I do not recall the exact time, but there was—I did instruct a subordinate to interview him for the purpose of obtaining data concerning his birth and so forth. But 169 I can't recall the exact time that that took place.

Q. Do you recall the subordinate whom you instructed to interview Mr. Heikkinen?

A. Yes.

Q. Who was that?

A. That was Mr. Paul G. Maki.

Q. That's M-a-k-i?

A. M-a-k-i, an Immigrant Inspector.

Q. And he is now in the courtroom?

A. Yes.

Q. Now, after Mr. Maki received instructions from you to interview Heikkinen, did he ever bring back to you any form which had been filled out in reference to that interview?

A. Yes, he did.

Q. He did. And did you see it?

A. Yes, I saw it.

Q. Do you have it with you?

A. No.

Mr. Essin: I assume the Government has it?

The Court: What was that question?

Mr. Essin: I say, I assume the Government has that document?

The Court: Do you know where that document 170 is?

The Witness: I don't know where it is now.

The Court: Where was it the last time you saw it?

The Witness: Well, we sent it away, the last time, from the office. I don't know where it—

The Court: Where did you send it to?

The Witness: We sent it to the District Director of Immigration and Naturalization at Chicago, Illinois, my immediate superior.

The Court: Now, let me straighten this out. What was the purpose of sending this man over to see the defendant? To obtain what information?

The Witness: Well, we had received a call to obtain—in the usual course of events in connection with deportation proceedings, a form is filled out, containing personal data, usually called passport data, which is sometimes obtained by the Hearing Officer, and sometimes by another officer. And this is placed in the file. And this was done in accordance with instructions, and was forwarded to the 171 District Director of Immigration at Chicago, Illinois.

Mr. Essin:

Q. Now, since it was forwarded, you did not see it?

The Witness:

A. I haven't seen it, that I can recall.

Q. Well, as a matter of fact, wasn't there another proceeding after that time, when you did see it?

A. What proceeding do you have reference to, Mr. Essin?

Q. Well, I am asking you the question just that way: A proceeding of any kind involving Heikkinen when you saw it.

A. I don't recall right now.

Q. I see.

A. It may have been presented, but I can't recall it now. I haven't seen any part of that for a number of years.

The Court: How long have you been out of the Government service?

The Witness: Since December 1, 1955. But this case, all of the files and everything relating to this case had been forwarded to the District Director a long time before that, and I haven't had any connection with them.

The Court: Where is he located?

172 The Witness: Chicago, Illinois.

Mr. Essin: Your Honor, I move that the Government produce the document to which Mr. Gordon has referred.

Mr. Rapp: Please the Court, I will— I have no objection to producing a copy of the document which was prepared from information obtained by Mr. Maki in a personal conversation. I cannot produce the original one. And I will, in due course of the trial, present Mr. Maki on the stand, and we will go into that problem.

The Court: And you will have a copy of that?

Mr. Rapp: I have a copy.

Mr. Essin: Well, your Honor, I make no issue about the presentation of the original, if the Government has a copy.

Mr. Rapp: It is a copy.

The Court: If the original is not available, the copy will have to take its place.

Mr. Rapp: Do you want it produced at this time, your Honor?

The Court: No, not now, no.

173 Mr. Essin: I didn't understand you, your Honor, I was asking to have that produced now.

The Court: Well, I thought he wanted to put the witness Mr. Maki on the witness stand, and let him tell the date and circumstances under which he took it, and then it will be available.

Mr. Rapp: That is what I propose to do.

The Court: Yes, that will be done.

Mr. Rapp: In the orderly course of this trial.

Mr. Essin: All right.

The Court: I think this man has told us all he knows about it. About all you did was send the defendant his notice of the order of deportation, and that he was to leave the country within six months after that.

The Witness: That's right.

The Court: That's all you did, wasn't it?

The Witness: That is all I did about it.

The Court: That is all you knew about it.

The Witness: That is all I knew about it.

Mr. Essin:

174 Q. Now, Mr. Gordon, at the time that you were— before your retirement, and particularly in 1952, your office, through the chain of command, so to speak, and the

Immigration and Naturalization Service itself, for which you worked, came under the jurisdiction of the Attorney General of the United States. Is that right?

The Witness:

A. That is right. And that is—

Q. And from your own knowledge, the office of United States Attorney for the Western District of Wisconsin comes under the same jurisdiction of the Attorney General. Is that right?

A. Yes. In a different agency entirely. We have no direct connection.

The Court: With whom?

Mr. Essin:

Q. Except—

The Witness: That is, the Immigration and Naturalization Service is an agency in the Department of Justice, and the United States Attorney is another agency of the Department of Justice, and the two don't have any direct connection together.

175 Mr. Essin:

Q. Except, to use the colloquialism expression, they both have the same boss. Is that right?

The Witness:

A. We both have the United States Government as the same boss.

Q. Well, but in the chain of command, the Attorney General's office supervises both your agency and the U. S. Attorney's office. Right?

A. Yes.

Mr. Rapp: We will concede that the Commissioner of Immigration and Naturalization is General Joseph Swing and that he is an Assistant Attorney General, under the Attorney General, Herbert Brownell, Jr.

Mr. Essin: I haven't asked for a concession from the Government on that. I think Mr. Gordon's testimony is quite clear.

I have nothing further, Mr. Gordon.

The Court: That is all.

176 *Redirect Examination by Mr. Rapp.*

Q. Mr. Gordon, just one or two questions:

You are no longer employed by the Federal Government?

A. No.

Q. State whether or not you are here in answer to a subpoena of the Government?

A. I was subpoenaed to appear here, and I have no interest in this case whatsoever.

Mr. Rapp: Yes, sir.

The Court: That is all.

The Witness: May I be excused now?

Mr. Rapp: Will you have anything further with Mr. Gordon?

Mr. Essin: If it is possible for him to stay a little longer, I may want to recall him.

The Court: You may be excused.

Mr. Essin: Your Honor, is it possible for him to stay a little longer—not beyond today? I may want to recall him. I want to go over my notes a little.

Mr. Rapp: If it please the Court, Mr. Gordon has another commitment, and he wants to leave for Chicago. He has a train to catch and he has to leave from the hotel.

177 The Court: What time does his train leave?

Mr. Rapp: Five o'clock. He has to check out of his hotel and so forth.

The Court: It is ten minutes after three now. If you have anything further with Mr. Gordon, Mr. Essin, you had better examine him now.

Mr. Essin: Well, if I may have a moment to check my notes, then—

The Court: Yes.

Mr. Essin: If you will just wait there, Mr. Gordon, for a moment, it may not be necessary for you to take the stand again—(examining memoranda).

That is all. All right, I have no objection to his being excused.

The Court: That is all. All right, you may be excused, Mr. Gordon.

(Witness excused.)

178 Mr. Rapp: Call Mr. John J. Boldin.

JOHN J. BOLDIN, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination by Mr. Rapp.

Q. Will you state your full name, sir?

A. John J. Boldin.

Q. And what is your occupation?

A. Investigator with the Immigration and Naturalization Service.

Mr. Essin: Pardon me, Mr. Rapp. Could you speak up just a little, Mr. Boldin?

The Court: Speak a little louder, please.

Mr. Rapp:

Q. Do you want to repeat your answer, please?

The Witness:

A. Investigator with the Immigration and Naturalization Service.

Q. In 1952, were you stationed in Duluth, Minnesota?

A. I was.

Q. And operated out of the— Is that a District 179 office there?

A. Sub-office.

Q. Sub-office. How long have you been employed by the Immigration and Naturalization Service?

A. Since September, 1934.

Q. And as an investigator?

A. Since March, 1948.

Q. Now, I will ask you whether or not you were an investigator of the Immigration and Naturalization Service on February 12th, 1953?

A. I was.

Q. And on that date, in your capacity as an investigator of that Service, did you have an interview with Knut Einar Heikkinen, who is the defendant in this case?

A. I did, sir.

The Court: Now, let me see the last two exhibits there. Let's fix the date when Heikkinen got that notice. What is the date on that card?

Mr. Rapp: That card is dated May 1st, your Honor.

The letter is dated April 30th (indicating).

180 The Court: The letter, that is, the notice is dated April 30th, 1952?

Mr. Rapp: 1952.

The Court: And the—

Mr. Rapp: The postmark on it is May 1st (indicating).

The Court: And the postmark on the receipt is May 1st, 1952.

All right. With those dates in mind, now, proceed.

Mr. Essin: Pardon me. May the last question and answer be repeated, please?

The Court: What is that?

Mr. Essin: With the permission of the Court, may the last question and answer be repeated? I sort of lost track there.

(Former record read by reporter, as follows:)

“And on that date, in your capacity as an investigator of that Service, did you have an interview with Knut Einar Heikkinen, who is the defendant in this case?”

“Answer: I did, sir.”

181 Mr. Rapp: Will you mark this?

(Document produced by counsel is marked EXHIBIT 8 of 1/9/56 for identification, and submitted to Mr. Essin for inspection.)

Mr. Rapp:

Q. Did you take a statement from Mr. Heikkinen on that date, February 12, 1953?

The Witness:

A. I did.

Q. Where was that statement taken?

A. In the office of the Immigration and Naturalization Service at Duluth, Minnesota.

The Court: What was that date, again?

Mr. Rapp: February 12th, 1953.

The Court: And the date of the notice again, was May 1st, 1952?

Mr. Rapp: That is correct.

The Court: Go ahead.

Mr. Rapp: I will move—

Q. I show you what has been marked Exhibit 8, and ask you what that purports to be.

(Witness examines document.)

182 The Court: Well, I take it you have seen it before, haven't you?

The Witness: I have. That purports to be—

Mr. Rapp:

Q. Or what is it?

The Witness:

A. A question and answer statement that I took from Mr. Knut Heikkinen on that day, concerning his compliance with the applicable Statute in this case.

Q. Did you do the interrogation?

A. I did.

Q. Did you receive the answers from Mr. Heikkinen?

A. I did.

Q. Did you type those on the typewriter?

A. I did, myself.

Q. Did you put down the exact language that—the exact answers that Mr. Heikkinen gave you?

A. Yes, sir.

Q. And did Mr. Heikkinen read these questions?

A. He did, at the completion of the entire statement.

Q. And did he initial each page of this?

(Witness examines exhibit.)

A. He initialed the first seven pages, and the last page he signed in full.

183 Q. Did he indicate that he understood the material?

A. Yes, he did.

Mr. Rapp: We offer this in evidence, and move its admission.

The Court: I suppose you have an objection to it?

Mr. Essin: Yes, your Honor, and before I make all my objections I would like to ask some preliminary questions in reference to the taking of his statement.

The Court: I presume your objection is the same objection you made to the Exhibits 3 and 4?

Mr. Essin: And additional objections.

Preliminary Cross-Examination by Mr. Essin.

Q. Mr. Boldin, at the time you interviewed Mr. Heikkinen on February 12, 1953, in connection with which and as a result of which you prepared proposed Exhibit 8, did Mr. Heikkinen have an attorney with him?

The Witness:

A. No, sir.

Mr. Rapp: Please the Court, I object to that question and ask that the answer be stricken. It is not material.

The Court: I will let the answer stand.

Mr. Essin:

Q. Mr. Boldin, at that time, on that date—

The Court: You didn't— Did he request to have his attorney present?

The Witness: No, he made no request during the entire occasion of his presence at the taking of this statement.

The Court: Would you have made any objection to his attorney being present?

The Witness: I would not. I would have gladly consented to have one present, I would have granted him that privilege had he asked for it.

Mr. Essin:

Q. But you didn't advise him of his right to have counsel, did you, Mr. Boldin?

Mr. Rapp: I object to that question, if it please the Court: It is immaterial.

The Court: He may answer.

185 The Witness:

A. I didn't.

Mr. Essin:

Q. You did not. Is that right?

A. That's right.

Mr. Essin: That is all the preliminary questions. I would like to make my objections to this document now, if I may.

First, the objections to this proposed Exhibit 8, your Honor, are the same as the objections to Exhibits 3 and 4; and also that the defendant, Mr. Heikkinen, was not advised of his right to counsel, and did not have counsel with him.

There are parts of this statement which are comments by the taker of the statement, Mr. Boldin, on the conduct of certain other employees of the Immigration and Naturalization Service, in reference to Mr. Heikkinen; which it is

the defendant's contention have no place in this statement, and it is irrelevant and immaterial, but I would like to show to the Court and to counsel that which I believe 186 should be stricken, consisting entirely of— Let me strike that and restate it,—consisting of all of pages 6 and 7, and all except the last two questions and answers on page 8 (indicating).

The Court: We will take a recess at this time. I will take this and look at it during the recess.

Mr. Rapp, how much of this exhibit are you offering? The entire amount?

Mr. Rapp: I am offering the whole amount, but I have no objection to omitting those two portions.

The Court: Those two portions he has referred to?

Mr. Rapp: Yes, I have no objection.

The Court: Then I won't spend any time reading that—for the time being.

(Thereupon a recess was taken, after which the trial was resumed as follows:)

187 The Court: Exhibit 8, except for pages 6, 7, and the portion of 8 to which the defendant had objected, is admitted. Pages 6 and 7 and that part of page 8 is deleted from the record, or from the exhibit. The rest of it may be received.

Mr. Essin: I understand, your Honor, the rest of the statement is admitted over our objection previously made, is that right?

The Court: The rest of the statement is admitted over your objection, yes.

(Document previously marked was received in evidence as Exhibit 8 of 1/9/56.)

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Direct Examination by Mr. Rapp.

Q. Now, Mr. Boldin, you took this statement from Knut Einar Heikkinen on February 12, 1953, did you not?

A. Yes.

Q. Do you see that person that you took the statement from in this courtroom?

A. I do.

Q. And is he the defendant in this action?

A. He is.

Q. Will you point him out?

A. Yes. He is sitting at the table of—at the same table of his counsel, Mr. Essin.

The Court: I think the record may show that Mr. Heikinen is in court—isn't he, Mr. Essin?

Mr. Essin: The defendant is in court.

The Court: The man sitting next to you is Mr. Heikinen.

All right, go ahead.

Mr. Rapp:

Q. In connection with the taking of this statement, did you advise the defendant of his constitutional rights?

The Witness:

189 A. I did.

Mr. Essin: Your Honor, I object to the question and move the answer be stricken. The statement speaks for itself, and—

The Court: Objection overruled.

Proceed. He will save time by reading this now.

Mr. Rapp: In order to save time, may he read this statement, your Honor?

The Court: You may read it.

Mr. Essin: Pardon me, your Honor. Before Mr. Rapp starts reading, could I have a copy, so that if there are inadvertent errors made in the reading they can be corrected?

Mr. Rapp: I have a copy.

(Copy of Exhibit 8 is submitted to Mr. Essin by Mr. Rapp.)

Mr. Essin: All right, sir. Thank you.

Mr. Rapp: Incidentally, that is a certified copy which you have in front of you. This (indicating) is the original; the exhibit is the original. You have a certified copy.

190 Mr. Essin: All right, sir. Thank you.

Mr. Rapp: (Reading Exhibit 8.)

“Sworn Statement of Knut Einar Heikkinen made before Investigator John J. Boldin on February 12, 1953, in Room 319 Post Office Building, Duluth, Minnesota, relative to compliance with the provisions of Section 23 of the Internal Security Act of 1950 as re-enacted in Section 242 of the Immigration and Naturalization Act”—

Mr. Essin: Nationality Act.

Mr. Rapp: (Continuing:) “—Immigration and Na-

tionality Act relating to the deportation and supervision of aliens. Statement taken direct on the typewriter by Investigator Boldin. Examination conducted in the English language.

"Investigator to Alien:

"Question: I am an Officer of the United States Immigration and Naturalization Service. I have power by law to administer oaths and to take and to consider evidence from any person concerning any matter which is material and relevant to the enforcement of the Immigration and Nationality Act, and to take a written record of such evidence. I desire to question you under oath concerning your compliance with the provisions of Section 23 of the Internal Security Act of 1950, as re-enacted in Section 242 of the Immigration and Nationality Act, relating to the departure from the United States and timely application in good faith for travel documents necessary for such departure within six months from the date of a final order of deportation which is outstanding against any alien who is within any of the prescribed classes of deportable aliens prescribed therein, as well as their supervision under parole. Any statements which you make must be voluntary and may be used by the Government in any criminal proceeding. Are you willing to make such a statement voluntarily under oath at this time?

"Answer: Yes.

"Question: I shall quote to you the definition of perjury from Title 18, U.S.C., Section 1621:

192 " 'Whoever, having taken an oath before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered; that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both.' Do you understand that, Mr. Heikkinen?

"Answer: I do."

Mr. Essin: Yes.

Mr. Rapp: (Continuing) "Please—"

Mr. Essin: Hold that, Mr. Rapp. That is not a correct reading:

"Do you understand that, Mr. Heikkinen?" And what is the answer?

193 Mr. Rapp: Answer: "Yes."

Mr. Essin: All right.

Mr. Rapp: (Continuing)

"Question: Please stand to be sworn"—I apologize for the error.

Mr. Essin: I understand it is inadvertent, but I think it is important to have it correct.

Mr. Rapp: (Continuing)

"Question: Please stand to be sworn and raise your right hand. (Complies.) Do you solemnly swear that the statement you are about to make will be the truth, the whole truth, and nothing but the truth, so help you God? .

"Answer: I do.

"Question: What is your name and present address?

"Answer: Knut Einar Heikkinen, 603 Tower Avenue, Superior, Wisconsin.

"Question: By whom are you now employed and in what official capacity?

"Answer: By American Finnish Publishers, Inc. 604 Tower Avenue, in Superior, as assistant editor, that 194 means news editor of the *Tyomies Eteenpain*.

"Question: Do you have your Alien Registration Card here with you?

"Answer: Here it is. (Presents Alien Registration Receipt card #4316699 issued to Knut Einar Heikkinen—returned to alien.)

"Question: Are you the Knut Einar Heikkinen who was ordered deported to Finland on April 25, 1952, by the United States Immigration and Naturalization Service under Warrant, Deportation of Alien No. A4316699T by Marcus T. Neelly, District Director, Chicago District, the original of which I now show you, under the following provisions of the laws of the United States, as set forth in that Warrant:

" 'The Immigration Act of May 1926, 19' "—I am sorry. I will commence that quotation over:

" 'The Immigration Act of May 26, 1924, in that, at the time of entry he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder; and

" 'The Act of October 16, 1918, as amended, in that

195 he was, after entry, a member of the following class set forth in Section 1 of said Act: An Alien who was a member of the Communist Party of the United States.'

"(Warrant of deportation No. A4316699 T, covering Knut Einar Heikkinen inspected by alien.)

"Are you the person who is covered by that Warrant?

"Answer: Yes.

"Question: Our Duluth File A4316699 T contains copy of a letter addressed to Mr. Knut Einar Heikkinen, 603 Tower Avenue, Superior, Wisconsin, by Harry Gordon, Officer in Charge of the Immigration and Naturalization Service at Duluth, Minnesota, dated April 30, 1952, being a notification that a warrant directing his deportation to Finland had been issued on April 25, 1952, by Marcus T. Neelly, District Director, Chicago District, quoting the charges under which he was ordered deported and enclosing a copy of the Warrant of Deportation. It was mailed to you as Registered Article No. 32114, and the copy bears further endorsement that a copy was also mailed to your attorney Isadore Englander, Esquire, 205 E. 42 St., New York 17, N. Y. for his information. Did you receive 196 the original of that letter by Registered mail, copy of which I now show you? (Inspected by alien.)

"Answer: Yes, I did.

"Question: Duluth file also contains copy of Form I-229, being a letter addressed to Mr. Knut Einar Heikkinen, 603 Tower Avenue, Superior, Wisconsin, by Harry Gordon, Officer in Charge of the Immigration and Naturalization Service at Duluth, Minnesota, dated April 30, 1952, file No. A4316699 T, showing thereon that it was sent to you by mail as Registered Article No. 32114. Such letter further notified you that an order directing your deportation from the United States had been entered on April 25, 1952, quoting the grounds contained in the Warrant. That letter also reminded you of the provisions of Section 23 of the Internal Security Act of 1950, directing your attention to the requirement of the Statute requiring you to depart from the United States within a period of six months from the date of the order of deportation entered in your case and to make timely application in good faith for travel documents necessary to your 197 departure. That letter also called your attention to the penal provisions of the law and emphasized the importance of making every effort in good faith to obtain

a passport or other travel document so that you could depart from the United States within the required six months period of time, which would expire on October 25, 1952. Did you receive by Registered mail the original of that Form I-229 letter which I have described, and copy of which I now show you? (Inspected by alien.)

"Answer: It must have been received because there is my return receipt on it. I cannot recollect it any more.

"Question: Did you read the entire contents of both of those letters, following their receipt—the two letters which I have described and which you have also inspected?

"Answer: Sure.

"Question: After reading those two letters, did you understand the contents of both of the two letters here under discussion?

"Answer: Of course.

"Question: Did you seek advice from your lawyer, or from anyone else about what action you should take concerning your departure from the United States during the period of time indicated in the letter Form I-229, dated April 30, 1952?

"Answer: Yes, of course, I asked for information from Englander.

"Question: What advice did he give you concerning departure from the United States during the six months period commencing April 25, 1952 and also applying for a passport or other travel document with which to depart during that period of time?

"Answer: The advice was that whatever you do I have consult with him—not to do anything without advice from my attorney.

"Question: However, did you ask your attorney just exactly what you should do to comply with the provisions of the law in Section 23 of the Internal Security Act of 1950 of which you were reminded in the Form letter I-229, dated April 30, 1952?

"Answer: I informed my attorney that a representative from the Immigration Office came to Superior to see me at my place of work and took all the particulars for applying for a passport—at first to Canada and then for Finland. The understanding was that whenever I have to personally start to do something to get a passport I will be officially informed.

"Question: Who so informed you and when was that?

"Answer: Mr. Maki from this office. That was some time last summer. I cannot recollect the exact date. Upon informing my attorney about this, he said just wait until you get official information from the immigration authorities.

"Question: However, I want to call your attention that you were given official information by the immigration authorities, in the letter of April 30, 1952, on Form I-229, which is an outstanding letter of instruction to you. Did you thereafter disregard the obligation of the law under which you were placed requiring your departure from this country within six months commencing on April 25, 1952?

"Answer: No, not knowingly I have not disregarded anything.

"Question: Since receipt of the letter on Form I-229 dated April 30, 1952, did you depart from the United States in the required six months period thereafter?

"Answer: No.

Question: Have you departed from the United States at any time since April 30, 1952?

"Answer: No, I have just been waiting for instructions from the immigration authorities.

"Question: But you had already been given appropriate instructions in writing in the letter of April 30, 1952. What made you believe you would get any other instructions relative to your departure from the United States?

"Answer: The discussion with Mr. Maki at our office gave me the impression that he will write to the officials in Canada and Finland, and in case he will not succeed, then he will inform that I will have to do it myself.

"Question: Didn't Mr. Maki of the Duluth immigration office merely interview you at that time to execute an immigration form with which the Immigration and Naturalization Service was proceeding, independently of any efforts of yourself, to deport you from the United States?

"Answer: No, this was not the understanding. Mr. 201 Maki told me at first he will write to Canada and find out whether they will accept me because my last citizenship was Canadian. Mr. Maki stated that apparently it would take about two months to get the official answer from there. Then he stated he has start to a correspondence with the Consul General of Finland in New York and if he does not succeed to get an affirmative answer then it will befall upon me to apply personally.

to make an application for a visa to Finland. That was the essence—we had a lengthy discussion.

“Question: Did not Mr. Maki call your attention at the time of that interview with you, that you would have to proceed independently and simultaneously to apply for a passport with which to leave the United States within the six months period of time commencing April 25, 1952?

“Answer: At least I did not understand so.

“Question: At your deportation hearing, what country did you specify to which you should be deported if you were ordered deported from the United States?

“Answer: To my native country, Finland.

202 “Question: During the six months period commencing April 25, 1952, did you make every effort to obtain a passport or other travel document with which to enter Finland or any other country?

“Answer: No, because I was waiting for word from the immigration office.

“Question: Have you made any effort to secure a passport or other travel document with which to depart from the United States at any time since April 30, 1952?

“Answer: No, because of the reasons that I have stated.

“Question: Since the order of deportation was entered against you on April 25, 1952, did you receive any request from the Immigration and Naturalization Service to execute any passport application other than the interview with Mr. Maki of this office some time last summer when he apparently merely filled out an immigration form with which to present your case for issuance of travel documents to enter either Canada or Finland?

“Answer: No, and in fact I have been wondering
203 about that myself.

“Question: Did you wilfully refuse to depart from the United States within the six months period commencing on April 25, 1952, as required by the law?

“Answer: No.

“Question: Did you wilfully fail to depart from the United States within the six months period commencing on April 25, 1952, as required by the law?

“A. Answer: By no means, no.

“Question: Did you wilfully refuse to apply in good faith during the required period of time in your case, for a passport or other travel document which you could depart from the United States by October 25, 1952?

"Answer: No.

"Question: Why did you fail to make timely application for a passport and to depart from the United States by October 25, 1952 as required by law in your case?

"Answer: Just because I was waiting for instructions from Mr. Maki as to when I should start to make 204 application for a passport. In case the Service had failed to get a visa or passport.

"Question: Are you willing to cooperate with the Attorney General of the United States to secure a passport or other travel document to enter any country that he may select for your deportation?

"Answer: I want to cooperate with getting a passport to Finland because at my age already I do not want to run into language troubles because it is not easy to pick up a foreign language.

"Question: Are you willing to cooperate with the Attorney General to secure a passport and to depart to any country other than Finland as the Attorney General may select?

"Answer: In that case I would have to consult with my attorney what to do.

"Question: Are you willing to leave the United States without any further delay in the event that the Attorney General of the United States secures a passport for 205 your departure from the United States to some other country?

"Answer: Again I would have to consult with my attorney as to what I should do. Such a solution would be too serious for me, for my life, without trying every legal means to get back to my native country.

"Question: I will ask again, was it on specific advice of your attorney, and not what impression Mr. Maki of the Duluth Immigration office allegedly conveyed to you, that you failed to apply for a passport and depart from the United States by October 25, 1952?

"Answer: My attorney advised me only to wait for instructions.

"Question: Instructions from him?

"Answer: No, from the Immigration Service.

"Question: I will now show you a copy of Form I-220-B, Order of Parole under Supervision, dated October 27, 1952; as executed by Knut Einar Heikkinen. (Inspected by alien.) Are you the person named in that order and did

you receive a copy of that order at the time of its execution?

206. "Answer: Yes, I am the person in question and I received a copy.

"Question: Have you submitted regular written parole reports to the immigration office at Duluth, Minnesota, since October 27, 1952, as required by the conditions of your parole?

"Answer: Regularly, with the exception of misunderstanding as to sending the first report in. I simply mixed up reporting to my supervisor and here.

"Question: Have you been complying with all of the conditions of your parole order of October 27, 1952?

"Answer: Absolutely.

"Question: Your attention is directed to Item (4) of that parole order under which you were required to submit reports in writing to Harry Gordon, Officer in Charge of the Immigration and Naturalization Service at Duluth, Minnesota, on the 1st and 15th day of each month, under subdivision (f) of which you were required to report any efforts to obtain a passport and to depart from the United States. In submitting your periodic written reports, did you at any time include any report concerning any efforts being made by you to obtain a passport and to depart from the United States?

"Answer: No, because if the misunderstanding I got from the"—

Mr. Essin: Hold it, Mr. Rapp—"because of the understanding"—

Mr. Rapp: (Continuing.)

"Answer: No, because of the understanding I got from the representative of the Service, Mr. Maki.

"Question: But that provision in item (f) was inserted on October 27, 1952, some time after your interview with Mr. Maki, under which you were required to report any efforts being made by you to secure a passport and depart from the United States and you should have complied with that provision in (f).

"Answer: That provision I must have missed it some way by error.

"Question: Are you now"—

208 The next question is not covered, your Honor. However, I will not read it, because, standing alone, it relates to something prior—and the last question is:

"Question: Have you understood all of my questions? .

"Answer: Certainly.

I have read the foregoing 8 pages of this statement and solemnly swear that it is a true and correct record of the statement made by me on this day and that all of my statements are true and correct."

"Signature of Alien"—and above that is the signature: "Knut E. Heikkinen."

"Witness: Paul G. Maki.

"Subscribed and sworn to before me, Investigator John J. Boldin, at Duluth, Minnesota, on February 12, 1953.

"(Signed) John J. Boldin, Investigator."

Mr. Essin: Your Honor, may I state that the question and answer which Mr. Rapp omitted to read, I see no 209 reason why it should not have been read.

Mr. Rapp: Standing alone, it doesn't relate to anything. However, I shall be very happy to read it.

The Court: All right. Unless—is it connected up with anything that I have ruled out?

Mr. Rapp: Yes, it is.

Mr. Essin: It is the first question after the part you ruled out (indicating).

(The Court examines exhibit.)

The Court: The only question and answer that will be received on the last page, page 8, will be the last question:

"Have you understood all my questions?

"Answer: Certainly."

Then the statement that has been read.

210 Mr. Rapp:

Q. Mr. Boldin, you have heard the reading of this statement. Is that a correct reading of the statement taken of you—or by you; from Knut Einar Heikkinen?

The Witness:

A. I believe it is.

Q. Now, in your capacity as an Immigration and Naturalization Investigator, did you have a conference with the defendant, Knut Einar Heikkinen, on October 27, 1952?

A. I did.

Q. And will you relate the circumstances under which that conference was had? Where it was, and so forth?

A. It was held in the office of the Immigration and Naturalization Service, Duluth, Minnesota. He appeared

at our office in response to a letter written by Harry Gordon, Officer in Charge, to come in for an interview.

Q. And was that in the normal course of events, that is, in the normal handling of a case pursuant to law, such as Mr. Heikkinen's deportation proceedings?

A. Yes.

Mr. Essin: Hold that—hold that. Now, I object to that question.

211 The Court: Well, was it done pursuant to your rules and regulations in this matter?

The Witness: Yes.

Mr. Rapp:

Q. And was there any occasion for that particular date, October 27th, being picked out?

The Witness:

A. Yes, there was.

Q. And what was that?

A. It was required under the statute, Section 23 of the Internal Security Act, that Mr. Knut Einar Heikkinen be placed under an order of supervised parole, or order of supervision; because the order, the final order of deportation was then six months old. The statute requires that when an order of deportation is six months old, then he must be placed under supervised parole, which was the occasion of my interview of Mr. Heikkinen on that date.

Q. And during the course of that conversation, state whether or not you asked him any questions relative to his leaving the country?

A. I did.

Q. What questions did you ask him?

A. I asked Mr. Heikkinen if he had made any ap-
212 plications to obtain any passport with which to depart from the United States or any travel document.

Q. What was his answer?

A. He stated that he had made no efforts and had made no applications to obtain a travel document.

Q. Did you— State whether or not you asked him whether or not he had left the country?

A. I asked him if he had left the country, and he stated he did not.

Mr. Rapp: That's all.

Cross-Examination by Mr. Essin.

Q. Mr. Boldin, how long have you worked for the Service, altogether?

A. Since September, 1934.

Q. And you are still employed by the Service?

A. I am.

Q. And by the Service, we refer to the Immigration and Naturalization Service. Right?

A. Yes. It was—

Q. When I say "Service", I mean the Immigration and Naturalization Service.

A. Yes.

213 Q. You understand that, don't you?

A. Yes.

Q. All right. Now, on how many occasions altogether did you interview, since you first knew Mr. Heikkinen, did you interview him?

Mr. Rapp: Please the Court, I would object to this question. If he wants to limit it to the time that is pertinent to this indictment, I have no objection to it.

The Court: That's all. It will be limited to the period that is named in this indictment.

Mr. Essin: Your Honor, Count 2 of the indictment—

The Court: What happened after he was indicted, after the period in which he was indicted, has no bearing on this matter.

Mr. Essin: Well, up to the time he was indicted—

The Court: Go ahead with your question.

Mr. Essin: Okay. The Court has limited it up to the time of the indictment—or would the witness want me to restate that?

The Court: What is that?

Mr. Essin: I am asking the witness whether he
214 would want me to restate that question.

The Court: Go ahead.

The Witness: I believe so.

Mr. Rapp: Your Honor, my objection was that he should be limited to interviews during the period from May 9, 1952, to the six month period thereafter.

Mr. Essin: But, your Honor, Count 2 refers to a period of longer than six months..

Mr. Rapp: I will withdraw my objection.

The Court: Restate your question.

Mr. Essin:

Q. Mr. Boldin, how many times did you see or meet with or interview Mr. Heikkinen, from April 9, 1952, and thereafter?

Mr. Rapp: Until when?

Mr. Essin: I stated when. I said "thereafter."

And I would suggest, your Honor, that we refer to Count 2 of the Indictment, which doesn't limit it to six months.

The Court: Go ahead and answer the question. How many times have you talked with Heikkinen about this case?

215 The Witness: I can't state the exact number of times. I interviewed him for the first time after April 9, 1952, on October 27, 1952, which was the occasion of placing him under supervised parole as required by statute.

Mr. Essin:

Q. And that was the first time, is that it, to your knowledge?

The Witness:

A. I believe so.

Q. And then the next time was February 12, 1953, is that it?

A. That is, I believe, when I took the sworn statement that was introduced as an exhibit and read here by Mr. Rapp.

Q. Now, on February 12, 1953, and immediately—strike that.

Immediately prior to February 12th, 1953, did you on your own initiative, or at the direction of one of your superior officers, call in Heikkinen into the Duluth office of the Service?

A. On which occasion?

Q. Well, I am referring to the period immediately
216 before February 12, 1953.

A. Mr. Heikkinen was called into the office for interview by a letter written by my Officer in charge, Harry Gordon.

Q. Harry Gordon, and the letter informed Mr. Heikkinen that he was to be interviewed by you. Is that it?

A. No, no.

Q. So, you happened to be, when he came, the man who was assigned to interview him, is that it?

A. I was the man that was assigned to interview Mr. Heikkinen.

Q. And you decided at that time to take a written statement from him, is that it?

A. Not on October 27, 1952.

Q. No, I am referring to February 12, 1953.

A. Well, at that time—

Q. Yes.

A. (Continuing)—I was directed to take such a statement by my superior. I was assigned for that purpose.

Q. Now, Mr. Heikkinen came in voluntarily, did he not?

A. Oh, yes.

Q. As a matter of fact, subsequently, on—

The Court: Do you mean he came in voluntarily after he was notified to come in?

217 The Witness: Yes, in response to the letter.

Mr. Essin: And strike out the word "subsequently" that I stated.

Q. And prior to that, on October 27th, 1952, when he came to the Duluth office of the Service, he also came in voluntarily, in response to the letter. Right?

The Witness:

A. That is right.

Q. Now, at that time, you say he was placed under supervisory parole—or supervised parole, is that right?

A. Yes.

Q. Now, under the terms of that parole, was he required to report, either in person or in writing, at stated intervals?

A. He was required to report in writing only, at stated intervals.

Q. And how frequent were those intervals?

A. I believe twice, on the 1st and 15th of each month.

Q. Oh, you mean twice every month?

A. Yes.

Q. And to your knowledge, Mr. Heikkinen did generally keep his commitment in so far as writing in twice a month?

A. Yes.

218 Q. Is that right?

A. Yes.

Q. And Mr. Heikkinen, to your knowledge, was never

reprimanded or called to task by the Immigration Service for failure to write in twice a month as he was required to do?

Mr. Rapp: If it please the Court, I object to that question. It relates to supervision.

The Court: Objection sustained.

Mr. Essin: Well, your Honor, the question of supervised parole was brought up on direct examination.

The Court: Objection sustained. I have already ruled on that.

Mr. Essin:

Q. Now, Mr. Boldin, I refer you to the statement of February 12, 1953; and would you look at the copy that is the exhibit—which is Exhibit No. 6—my mistake, I think that is another number—It is Exhibit No. 8 (submitting document to the witness).

I refer you to page 2 of Exhibit No. 8. And I refer you to the question at the very top of page 2:

“Are you the Knut Einar Heikkinen who was ordered deported to Finland on April 25, 1952?”

219 A. As a matter of fact, there was no order of deportation entered on April 25, 1952. Isn't that right?

The Witness:

A. A warrant of deportation was issued on that date.

Q. I am referring to the question that you asked Mr. Heikkinen.

And you asked Mr. Heikkinen whether he was the person who was ordered deported to Finland on April 25, 1952.

A. I believe the warrant of deportation is also a command—an order of deportation. That is how I viewed it.

Q. Now, how many orders of deportation are there in Mr. Heikkinen's case?

A. One.

Q. And that one is dated April 9, 1952. Isn't that right?

A. That's the order of deportation—by the Board of Immigration Appeals.

Q. That's correct.

The Court: Speak out louder.

The Witness: That is the order of deportation, entered by the Board of Immigration Appeals.

220 Mr. Essin:

Q. And that is Exhibit No. 5, isn't that right?
(Submitting exhibit to witness.) And you are looking now at Exhibit No. 5. Isn't that right, Mr. Boldin?

A. Uh huh. That is correct.

Q. I am sorry. I didn't get your answer.

A. You asked me the question if I was looking at the exhibit, and I said, "That is correct."

Q. Now, Exhibit 6 is the order of deportation, is it not—I am sorry—Exhibit 8 (indicating) is the order of deportation; is it not?

The Court: No.

Mr. Essin: I am sorry.

The Court: Exhibit 8 is the Boldin statement—the statement he took from Heikkinen.

Mr. Essin: I am sorry—strike that.

Q. Exhibit 5 (indicating) is the order of deportation, is it not?

The Witness:

A. That is correct.

Q. And the order of deportation is dated April 9, 1952. Isn't that right?

A. That's right.

221 Q. All right. So, when you refer in your question on page 2, at the top of the page, of the statement of Mr. Heikkinen, that he was ordered deported to Finland on April 25, 1952, that is incorrect, isn't it?

A. It is not incorrect in connection with the question put to him. It states "under warrant of deportation of alien No. A4316699 by Marcus T. Neelly, District Director, Chicago District, the original of which I now show you."

Q. Now, Mr. Boldin, the warrant of deportation of alien, dated April 25, 1952, which you claimed you showed Mr. Heikkinen on February 12, 1953, had never been served on Mr. Heikkinen. Isn't that true?

A. That is not true.

Mr. Essin: All right. Mr. Rapp—

The Court: What was your answer?

The Witness: I said that is not true.

(The following proceedings were had between the Court and counsel at the bench, out of the hearing of the jury:)

Mr. Essin: Exhibit No. 1 contains the order, that is, the warrant of deportation of alien, which shows no

222 return as to service upon Mr. Heikkinen. I would like to have that extracted from the record, to impeach the testimony of this witness.

Mr. Rapp: I object to that.

(The following further proceedings were had in the presence and hearing of the jury:)

The Court: Will you read to the witness the question, and then also read his answer?

(Former record read by the reporter, as follows:)

"Question: Now, Mr. Boldin, the warrant of deportation of alien, dated April 25, 1952, which you claimed you showed Mr. Heikkinen on February 12, 1953, had never been served on Mr. Heikkinen. Isn't that true?

"Answer: That is not true."

The Court: Do you know whether it is true or not, of your own knowledge?

The Witness: I know that. It is not true.

The Court: Why do you know that?

The Witness: Because in the sworn statement here, I can point out—

The Court: What is that?

223 The Witness: In this sworn statement that I took from him—

The Court: Yes?

The Witness: (Continuing.) —I do call the attention of Mr. Heikkinen that two letters were served on him on April 30, 1952, one by Registered mail, Registered Article No. 32114, one of which was the Form I-229 letter dated April 30th, 1952.

May I refer to this, before I proceed?

The Court: Yes, yes.

(Witness examines exhibit 8.)

The Court: If there is any part of those missing pages that will be helpful to you, you may look at those, too. Where are those missing pages?

The Witness: Yes, here it is— Right here it is (indicating).

On page 2, the second question, I believe, covers what I am endeavoring to testify to. The question, directed to Mr. Heikkinen:

224 "Our Duluth file A4316699 T contains copy of a letter addressed to Mr. Knut Einar Heikkinen, 603 Tower Avenue, Superior, Wisconsin, by Harry Gordon, Officer in charge of the Immigration and Naturalization Serv-

ice at Duluth, Minnesota, dated April 30, 1952, being a notification that a warrant directing his deportation to Finland had been issued on April 25, 1952, by Marcus T. Neelly, District Director, Chicago District, quoting the charges under which he was ordered deported and enclosing a copy of the Warrant of Deportation."

That is what I am testifying to. A second letter

Mr. Essin:

Q. Now, Mr. Boldin, you testified that the Exhibit No. 5, dated April 9, 1952, is the order of deportation. Right? (Witness examines exhibits.)

The Court: Is that Exhibit 5?

The Witness: Exhibit 5. He said Exhibit 6.

The Court: This is Exhibit 5.

Mr. Essin: No, I didn't say Exhibit 6. I said Exhibit 5.

225 The Court: If somebody would move around here once in a while and pass these exhibits back and forth—(Examining exhibits).

Now, this isn't—this isn't the order. This is the order that the appeal be dismissed.

Mr. Essin: Your Honor, that is the final order entered in this matter.

The Court: Get your exhibits straightened out. Where is the order of deportation? What number is that? This is the appeal from that order.

Mr. Essin: Yes, Your Honor.

Mr. Rapp: Exhibit No. 4 (indicating).

Mr. Essin: That (indicating) is the final order dismissing the appeal. That is the final order entered in this matter.

The Court: What do you want? Ask your question. Let's move along.

Mr. Essin: I have asked the question, your Honor.

The Court: Read the question.

(Last question read by reporter, as follows:)

"Question: Now, Mr. Boldin, you testified that the Exhibit No. 5, dated April 9, 1952, is the order of deportation. Right?"

226 Mr. Essin:

Q. And that no order of deportation was ever entered, deporting, or ordering Mr. Heikkinen's deportation to Finland. Isn't that right?

The Witness:

A. As to that, I do not know. I have no knowledge.

Q. You don't know?

A. I have knowledge of the fact that Mr. Heikkinen's deportation to Finland was directed in the order of deportation which I have described on the second question of page 2 of Exhibit 8.

The Court: Did you ever see any order of deportation which directed his deportation to Finland? Or are you just surmising that now?

The Witness: I didn't see any order of deportation.

The Court: You didn't see any?

The Witness: I saw a warrant of deportation, directing his deportation, which I showed to Mr. Heikkinen.

The Court: And that directed his deportation to where?

The Witness: To Finland. Continuing—

Mr. Essin: Now— I am sorry. Go ahead.

227 The Witness: I wanted to complete my previous answering.

This warrant of deportation that I have described is further covered by this statement in my question to Mr. Heikkinen:

Mr. Essin:

Q. What page are you referring to?

The Witness: (Reading from Exhibit 8): "It was mailed to you as Registered Article No. 32114, and the copy bears further endorsement that a copy was also mailed to your attorney, Isadore Englander, Esquire, 205 E. 42 St., New York 17, N. Y., for his information. Did you receive the original of that letter by Registered mail, copy of which I now show you? (Inspected by alien.)

"Answer: Yes, I did,"
is the answer.

Q. All right. Mr. Boldin, you have testified that there was no order—am I correct in stating that you have testified that there was no order of deportation entered at any time which ordered Heikkinen's deportation to Finland?

A. I don't—

228 Q. Now, we are talking about order entered, court orders.

The Court: He said that. He said there was a war-

rant. There is no order, but there was a warrant. He has already testified to that.

Mr. Essin: All right.

Q. Now, the warrant of deportation was not issued by anybody of the Immigration Service as the result of a hearing, was it?

The Witness:

A. Yes, it was.

Q. I am talking about a hearing.

A. A deportation hearing, yes. Following the completion of a deportation hearing, a warrant of deportation was issued.

Q. After the order was entered, is that right?

A. Yes.

Q. But the warrant itself was not issued by a Hearing Officer or by an Appeals Board, was it?

A. They are not issued by such officers.

Q. Oh, they are not?

A. No.

Q. Now, have you been in court here all day today?

A. Yes.

229 Q. Mr. Boldin—you have?

A. Yes.

Q. And during the time when the proceedings were going on, you were in court, is that right?

A. Yes.

Q. Now, at no time when you were in court was any warrant of deportation submitted in evidence, as far as you know, was it?

Mr. Rapp: Please the Court, I object to that question. The record speaks for itself.

The Court: There is an order of deportation in this record.

Mr. Essin: No, we are talking about a warrant of deportation, your Honor, which is an entirely different document.

Mr. Rapp: There is a warrant of deportation in the Exhibits 1 and 2—as a matter of fact, there are two of them in there.

Mr. Essin: Your Honor, I would like to renew my motion—

The Court: Well, he was sitting here in the courtroom. He wasn't pawing through these exhibits.

Mr. Essin: I am asking him what he heard, your
230 Honor.

The Court: What is that?

Mr. Essin: I am asking him what he heard. I am asking him what he heard. He was here all day.

The Court: He didn't hear any more than the jury heard.

Mr. Essin: Well, that's all I am asking him.

Your Honor, I would like to renew my motion to have extracted from Exhibit No. 1 the warrant of deportation, to offer it in evidence here to show that no return of service is indicated, on the warrant of deportation.

The Court: The Court will look into that during the recess. I will reserve my ruling on that.

Mr. Rapp: May I just state for the record that Exhibits 1 and 2 are already in evidence, and if one portion of it is going to be removed, I suggest that all of it be removed, and be made available to the jury, and not take it piece meal.

The Court: Is there a warrant in there, for his deportation to Finland? Let me see it.

(Mr. Rapp examines exhibits.)

231 Mr. Rapp: There are two warrants. This (indicating) is the second warrant which was issued, and the first one is here—to Finland.

Mr. Essin: And neither one of them shows service made upon the defendant.

The Court: What is that? Well, there are other ways of proving service. It doesn't have to appear upon the warrant.

Mr. Rapp: No. Furthermore, it does not have to be served upon the defendant. Only the order has to be served upon the defendant.

The Court: His order of deportation.

Mr. Rapp: And that was done.

Mr. Essin: Well, if the Government is willing to concede that a warrant of deportation need not be served upon the defendant—

Mr. Rapp: We are not conceding anything, your Honor.

Mr. Essin: All right.

Mr. Rapp: But there is proof that this warrant of deportation was sent by Registered mail by Mr. Gordon, which Mr. Gordon testified, and which this (indicating) is a return receipt of. That was included in that.

232 The Court: Well, a copy of this warrant of deportation was in the letter?

Mr. Rapp: That is correct.

The Court: The letter, the communication sent by Gordon?

Mr. Rapp: That is correct. And in this statement, marked Exhibit 8 (indicating), Mr. Heikkinen admits receipt, not only of the letter with the form in it, but also of this warrant of deportation.

The Court: Well, that's sufficient, then.

Mr. Essin: May I see that exhibit again, please? No, not this exhibit—

The Court: You have seen it.

Mr. Essin: No, I don't mean this exhibit—no, the other one (indicating). I don't mean this one.

The Court: Well, Heikkinen did admit to you that he did receive a copy of the warrant of deportation?

The Witness: The letter with the copy.

The Court: In that letter, and that was in the Registered letter on which he signed the receipt, in which the receipt is marked Exhibit 7?

233 The Witness: Your Honor, Registered Article 32114—

The Court: And Heikkinen admitted he had received that warrant of deportation?

The Witness: The letter and the warrant—

The Court: What is that? The letter and the warrant?

The Witness: The transmittal letter and the warrant.

The Court: That is sufficient.

Mr. Essin: If the Court please, it seems there are a couple of exhibits—there is one in here some place (examining exhibits)—

Mr. Rapp: If it please the Court, I have one further observation on that:

Under the law it is not required that the warrant of deportation must be served on the defendant, in these proceedings. The warrant is directed to the officer in charge of the Immigration and Naturalization office, or any one of his subordinates.

The Court: Make that statement for the record. Make that statement again, Mr. Rapp.

Mr. Rapp: If it please the Court, under the laws
234 of the United States it does not appear that a warrant of deportation need be served upon the defend-

ant. The warrant itself is directed—the warrant of deportation of alien is directed, not to a particular defendant, but to an officer in charge of an Immigration and Naturalization Service of a particular area, or any of his employees or subordinates. And it authorizes them to take the man into custody or—

The Court: Let me see that once more, will you, please? (Examining exhibit.)

Mr. Rapp: However, in this case, your Honor, the warrant was served on him. It is directed to the officer in charge.

The Court: Let the record show that the warrant of deportation dated the 25th day of April, 1952, No. A4316699 T is directed to: "Officer in Charge, Immigration and Naturalization Service, Duluth, Minnesota, or to any officer or employee of the United States Immigration and Naturalization Service:

"Whereas, after due hearing before an authorized Hearing Officer and upon the basis thereof, an order 235 has been duly made that the alien, Knut Einar Heikinen, who entered the United States at an unknown place in or about 1933 is subject to deportation under the following provisions of the laws of the United States to-wit:

"The Immigration Act of May 26, 1924, in that, at the time of entry he was an immigrant not in possession of a valid immigration visa and not excepted from the presentation thereof by said Act or regulations made thereunder; and

"The Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.

"I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, do hereby command you to deport the said alien to Finland, at the expense of the appropriation Salaries and Expenses, Immigration and Naturalization Service, 1952.

236 "For so doing this shall be your sufficient warrant."

This is directed to the Officer in charge, who was in charge at that time—whoever was in charge at that time—Harry Gordon, I think was in charge at that time.

"For so doing this shall be your sufficient warrant.

"Witness my hand and seal this 25th day of April, 1952."

Mr. Essin: Your Honor—

The Court: He knew about that, so what is all this discussion?

Mr. Essin: Your Honor, my contention is that the document was never served upon the defendant.

The Court: He has testified he received a copy of that by Registered mail. That is his testimony.

Mr. Essin: Your Honor, here is Exhibit No. 6, the very document which Mr. Boldin claims—

The Court: He didn't have to have a copy of that warrant. That was directed to this officer to take this man in charge and see that he was deported.

237 Mr. Essin: All right, then. Mr. Boldin claims that that warrant is an order of deportation, which it is not.

The Court: Oh, we know it is just a question of interpretation.

Mr. Rapp: It is a question of terminology, your Honor.

The Court: Yes. We are not going to discuss that any more. We are wasting time here over trivialities.

Mr. Essin:

Q. Now, Mr. Boldin,—

The Court: The defendant didn't have to have a copy of that warrant. He had a copy of the order of deportation, and then it was his duty to deport himself.

Proceed.

Mr. Essin: Your Honor,—

The Court: Go ahead.

Mr. Essin: I would like to point out here that again, on page 4—

The Court: He didn't have to have a copy of this warrant.

238 Mr. Essin: I would like to examine Mr. Boldin in reference to the very same issue on another page of the statement of Mr. Heikkinen, where again he asks the same question about an order of deportation in February—April 25th—

The Court: Well, the fact is that the order of deportation was dated April 9th, 1952, and the warrant was dated February—whatever it was—or April—what was the date of that warrant?

Mr. Essin: April 25th.

Mr. Rapp: April 25th is the first warrant.

Mr. Essin: Yes.

The Court: Two different documents entirely.

Mr. Essin: Yes.

The Court: One directed to the defendant, and the other directed to the officer in charge.

Mr. Essin: Right. Your Honor, this is our contention—

The Court: Let's waste no more time about that. Proceed.

Mr. Essin: All right.

Q. Now, Mr. Boldin, when you saw Mr. Heikkinen on October 27, 1952, Mr. Gordon again wrote to Mr. Heikkinen, and Mr. Heikkinen came right in. Right?

The Witness:

A. Yes.

Q. And were you assigned again to interview Mr. Heikkinen?

A. Yes.

Q. At that time, however, you did not take a written statement, did you?

A. No, other than executing the order of supervision, which is the document required by statute.

Q. Now, you claim that you asked him a question in reference to his departure, and you also claim that he stated he made no efforts to depart.

A. That's right.

Q. Is that what you claim?

A. Yes.

Q. You didn't think that statement important enough, however, to put down in writing, did you, as you had the statement of February 12, 1953?

A. It wasn't a question of importance, as to whether I was taking it in writing or not. It was merely a question of my duty as parole officer to inquire whether or not he took any steps. And it was the fundamental basis for my insertion of Item 4(f) of that order of supervision, in which I directed his attention to the necessity of advising this Service, in making his written parole reports, of any efforts that he makes to depart from the United States; and thereafter he never advised our Service that he made any efforts, in connection with his obligation under that order of supervision.

Q. I see. Now, he was—

The Court: You don't have to talk so loud.

Mr. Essin: I am sorry, your Honor.

The Court: Just keep your voice down.

Mr. Essin: I am sorry.

Q. April 12, 1952, what was your title?

I am sorry. I am sorry. I have got my dates mixed.
April 9, 1952, what was your title?

The Witness:

A. Investigator, Immigration and Naturalization Service.

Q. And on February 12, 1953, what was your title?

A. Investigator, Immigration and Naturalization Service.

Q. So that you had the same title on April 9, 1952, as you had on February 12 of the following year?

A. Yes.

241 Q. But on February 12 you took a written statement from Mr. Heikkinen—I am sorry—I will withdraw that last question.

What was your duty—what was your title, rather, on October 27, 1952?

A. Investigator.

Q. So that you had the same title and duties, generally, on October 27, 1952, as you had on April 12, 1953—

Mr. Rapp: Please the Court—

Mr. Essin:

Q. (Continuing) —is that right?

Mr. Rapp: I am going to object to this line of questioning. I can't see where it bears any relation to the issue involved in this case at all.

The Court: He made one investigation on the questions and answers, and he got all the information he wanted. After that he was acting as parole officer, weren't you?

The Witness: I was also acting as parole officer, from time to time.

The Court: Just wait a minute— And the defendant was supposed to make his reports to you—how often?

242 The Witness: Twice a month, to Harry Gordon, Officer in Charge, in writing.

The Court: Yes, he was to make reports to you; and there was no necessity for you to go back and question

him with questions and answers to obtain the information you already had, was there?

The Witness: No.

The Court: No.

Mr. Essin:

Q. Mr. Boldin, on any occasion, or on all the occasions that you saw Mr. Heikkinen and interviewed him, did he refuse to go to any country designated by the Immigration Service?

Mr. Rapp: I object to that question, your Honor. In the first place, it presumes that the Immigration Service had directed a country; and that is not in evidence in this particular case.

The Court: Objection sustained.

Mr. Essin:

Q. On the occasions that you interviewed or saw Mr. Heikkinen, did he tell you that he preferred to go to Finland, which was the country of his birth? Is that right?

243 The Witness:

A. I don't think he told me anything like that.

Q. Well, in the statement which you took on February 12, 1953, he told you that, didn't he?

A. He gave that as—that he preferred to go there, in the event that the Attorney General made arrangements for his deportation.

Mr. Essin: That's all.

The Court: That is all.

Any further examination? That is all.

Mr. Rapp: Yes, I am finished with him.

The Court: We will take a recess until tomorrow morning at ten o'clock.

(Witness excused.)

(Thereupon at 5:00 o'clock in the afternoon an adjournment was taken until Tuesday, the 10th day of January, 1956, at 10:00 o'clock in the forenoon.)

244 (The trial was resumed at Madison, Wisconsin on Tuesday, the 10th day of January, 1956, at 10:00 o'clock in the forenoon, pursuant to adjournment.)

Counsel Present:

Mr. Rapp, Mr. Essin.

The defendant, Knut Einar Heikkinen, was present in person.

The Court: You may proceed.

Mr. Rapp: Call Mr. Paul Maki.

245 PAUL G. MAKI, called as a witness on behalf of the plaintiff, having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination by Mr. Rapp.

Q. Will you state your full name, please?

A. Paul G. Maki.

Q. Are you employed by the Federal Government?

A. Yes, sir.

Q. And in what capacity?

A. I am an Immigrant Inspector, stationed at the Duluth office of the United States Immigration and Naturalization Service.

Q. During the year 1952, were you stationed at that Duluth office?

A. Yes, I was.

Q. And in that capacity?

A. Yes.

Q. How long have you been in the service of the Immigration and Naturalization?

A. Since July 22, 1940.

Q. Are you familiar with the case of Knut Einar—
246 the deportation proceedings in the matter of Knut Einar Heikkinen?

A. To a certain extent, yes.

Q. When did you have your first contact with that case?

A. Do you mean with Mr. Heikkinen?

Q. Yes, sir.

A. Approximately in February, 1952, or thereabouts, to the best of my recollection.

The Court: What year?

The Witness: February, about, 1952, to the best of my recollection.

Mr. Rapp:

Q. And what was the occasion for your seeing him at that time?

The Witness:

A. Some aspect or other of the proceedings was going on at Duluth and I recall that I was instructed by my superior officer to take Mr. Heikkinen from the County Jail in Duluth to downtown Duluth because there was something wrong with his eye glasses, and I had to take him to an oculist, I believe, or an optometrist.

Q. I see. It had nothing to do with the case?

A. No.

247 Q. Your first contact?

A. No.

Q. What was your next contact with him? Did you have any contact with him on or about April 18, of 1952?

A. Yes. On or about April 18, or within a day or two or three after that.

Q. And state the circumstances, and what you had to do with the matter.

A. I recall that I was instructed by my officer in charge to go to Superior, Wisconsin, and interview Mr. Heikkinen, to see whether I could obtain some personal history data from him to be recorded on a Passport Data form—and if I could obtain such information, to do so, record it, bring it back to the Duluth office.

The Court: Well, what did you do then? Did you proceed to obtain that information?

The Witness: Yes, I did.

The Court: Well, go ahead and tell us.

The Witness: I went to Superior, to the office where I thought I would find Mr. Heikkinen. I did.

I told Mr. Heikkinen that I had been instructed to see him, to ask him for personal history, some of his own
248 personal history; that I was to record it on a certain form I had with me, and would he be kind enough to furnish the data?

He thought it over briefly, and he said yes.

So I did exactly that. We filled out the Passport Data form, and I took it back to Duluth with me, typed it up, handed it to the officer in charge, and I assume he forwarded it on down to the Chicago office.

The Court: What was the date of that meeting?

The Witness: I know that it was April 21st, 1952, when I typed it up in the office.

Mr. Rapp:

Q. Is that the same day that you saw him?

The Witness:

A. Yes, I am sure it is.

Mr. Rapp: Will you mark this, please?

(Document produced by counsel is marked Exhibit 9 of 1/10/56 for identification, and submitted to Mr. Essin for inspection.)

249 Mr. Rapp:

Q. I show you what has been marked Exhibit 9, and ask you whether or not that is a copy of the document that you typed up from the information that you received from Mr. Heikkinen?

The Witness:

A. Yes.

Q. On or about April 21st, 1952?

A. 1952. That's it—or a copy of it.

Mr. Rapp: I offer Exhibit 9 in evidence. (Submitting exhibit to the Court.)

Mr. Essin: No objection, your Honor.

The Court: It may be received. You may give it to the jury.

(Document previously so marked for identification is received in evidence as EXHIBIT 9, and handed to the jury for examination; said original exhibit being certified on appeal to the Clerk of the United States Court of Appeals for the Seventh Circuit under the hand and seal of the Clerk of this Court, pursuant to rules.)

250 Mr. Rapp:

Q. Now, what—Did you advise Mr. Heikkinen the reason that you wanted to obtain that information?

Mr. Essin: Pardon me, Mr. Rapp.

(The following proceedings were had at the bench between the Court and counsel, out of the hearing of the jury:)

Mr. Essin: I just wondered whether he would want to hold up the questioning until the jury has had a chance to look at that form.

The Court: Oh, no. Go ahead.

Mr. Essin: All right.

(The following further proceedings were had in the hearing of the jury:)

Mr. Rapp: Will you read the question, Mr. Reporter?

(Pending question read by reporter, as follows:

"Did you advise Mr. Heikkinen the reason that you wanted to obtain that information?"

251 The Witness: v

A. Yes. I told him that I had been instructed to get this personal history: that I was going to prepare this on the Passport Data form, and that it would—on arriving in Chicago, would be considered by our Service down there with a view towards our Service obtaining some travel document or other—in his case.

Q. Is it customary for you, in cases of deportation, or the Immigration and Naturalization Service, to obtain this information for their files?

A. Yes.

Q. It is general information?

A. Yes.

Q. It isn't always used for the purpose of obtaining travel documents, however, is it?

Mr. Essin: Hold that, Mr. Maki. I object to the question as being leading—

Mr. Rapp:

Q. State whether or not it is.

Mr. Essin: Please—I object to the question, your Honor, as being leading.

The Court: It is leading. Reframe it. Objection sustained.

252 Mr. Rapp: I will rephrase my question.

The Court: Objection sustained.

Mr. Rapp:

Q. State whether or not the mere fact that your Service has this information necessarily means that they will fol-

low through and obtain or attempt to obtain travel documents?

The Witness:

A. Yes.

Mr. Essin: Hold that answer please. I object to that as calling for a conclusion.

The Court: Overruled. He may answer.

Did you answer it? Do you understand the question? Reframe your question.

The Witness: I would like to have it again.

The Court: I think it is a little confusing.

Reframe your question. Will you reframe your question, Mr. Rapp?

Mr. Rapp: I will withdraw the question.

The Court: He can read the question, if you wish.

Mr. Rapp: Mr. Reporter, would you read the question?

The Court: Yes, read the question.

253 (Last question read by reporter, as follows:)

"State whether or not the mere fact that your Service has this information necessarily means that they will follow through and obtain or attempt to obtain travel documents?"

The Witness:

A. No, it doesn't necessarily mean so.

Mr. Rapp:

Q. You were present in court yesterday, were you not?

A. Yes.

Q. You heard me read the statement of Knut Einar Heikkinen, which is Exhibit 8, taken by John J. Boldin on February 12th, 1953?

A. Yes.

Q. You were present at the time that statement was taken, were you not?

A. Yes.

Q. You witnessed that statement of Mr. Heikkinen's, did you not?

A. Yes. I wasn't present through all that interrogation. I was present at the last part, and actually myself saw Mr. Heikkinen sign the statement and witness it.

Q. Now, you heard me read this question:

254 "However, did you ask your attorney just exactly what you should do to comply with the provisions of the law in Section 23 of the Internal Security Act of 1950 of which you were reminded in the Form I-229 dated April 30, 1952?"

"Answer: I informed my attorney that a representative from the Immigration Office came to Superior to see me at my place of work and took all the particulars for applying for a passport—at first to Canada and then for Finland. The understanding was that whenever I have to personally start to do something to get a passport, I will be officially informed.

"Question: Who so informed you and when was that?"

"Answer: Mr. Maki from this office. That was some time last summer. I cannot recollect the exact date. Upon informing my attorney about this, he said just wait until you get official information from the immigration authorities."

I ask you, Mr. Maki, whether you had any contact
255 with Mr. Heikkinen from this—the date of this passport information here (indicating), which was April 21st, 1952, through the summer of 1952?

A. I know definitely of my own mind that I did not see Mr. Heikkinen from April 21st on, for almost an entire year.

Q. So that, when he speaks about this conference with you, he is referring to the April 21st date?

A. That is right. It must be so.

Q. All right. Now, then, he has stated that you informed—And I am paraphrasing here:

"I informed my attorney that a representative from the Immigration office came to Superior to see me at my place of work and took all the particulars for applying for a passport—at first to Canada and then for Finland."

State whether or not you made any statements or representations to him that the Government would apply to Finland or to Canada or to any other country for a passport for him?

A. I do not recall that I said anything like that to Mr. Heikkinen. He may have understood in our discussion at first, what is the nature of this Passport Data form?

256 I said nothing like that. I wasn't authorized to. I couldn't. I wasn't in position to say so.

Q. Was anything said from which he could get an un-

derstanding that whatever—"Whenever I have to personally start to do something to get a passport I will be officially informed?"

A. Will you repeat that, please?

Q. His statement is:

"The understanding was that whenever I have to personally start to do something to get a passport I will be officially informed."

A. But I don't understand. What do I have to answer?

The Court: Did you ever tell him that?

The Witness: No. No, I did not say that.

Mr. Rapp:

Q. Did you have any conversation with him relative to his obtaining a passport for leaving the country?

The Witness:

A. No.

The Court: Ordinarily, in the course of obtaining a passport, how is a passport obtained? Just tell the jury, if you know.

257 The Witness: If the Court please, I did use to handle deportation proceedings myself, prior to that time—

The Court: Well, do you know?

The Witness: And at that time, proceeding to get passport data—

The Court: Just wait a minute.

The Witness: Yes?

The Court: Do you know how a person obtains a passport? Do you know what goes on, the procedure?

The Witness: Yes, I know.

The Court: Then just tell the jury that. Say, for instance, I wanted a passport to go to Europe. What would I do?

The Witness: Your Honor, you would have to go and see the Clerk of your own District Court; inform the Clerk that you desire a passport—in your case, of course, an American passport, which is the only thing that— However, I remember that sometimes I deal with aliens.

He will ask you to fill out a form. You will have to present, to him, or to her, proof of your United States
258 citizenship, pay a fee; submit some photographs. He will send your application to the State Department, and they will consider it, and if they find it a valid application, they will issue your United States passport.

The Court: Would that be the same procedure—

The Witness: In our Service, however, I wasn't authorized to make applications for passports. I was instructed to get the information. Our Chicago office, the District Director of the Immigration and Naturalization Service was the only one who corresponded with Government officials, like Embassies and Consuls, and so on. That is a job where a policy-making man did the letter writing and so on. I couldn't do it.

Mr. Rapp:

Q. You are speaking now about an alien—

The Witness:

A. For whom?

Q. (Continuing.) —obtaining a passport for an alien to leave, or to enter another country?

A. That is for us, for our Service to try to get his passport to deport someone to. The District Director did those jobs.

259 Q. Let me ask you this question:

Is it at all necessary for an alien to obtain certain documents from this country to leave?

Mr. Essin: I object to that as calling for a conclusion.

The Court: Overruled. You may answer.

The Witness:

A. I don't believe exit requirements exist. They didn't then. They sometimes do in war time I know.

Mr. Rapp:

Q. But at this time they didn't?

A. No.

Q. No such regulations existed. But it isn't necessary— Strike that.

I will ask you whether or not you recall this:

"But you had already been given appropriate instructions in writing in the letter of April 30, 1952. What made you believe that you would get any other instructions relative to your departure from the United States?"

Answer: The discussion with Mr. Maki at our office gave me the impression that he will write to the officials in Canada, and Finland and in case he will not succeed,
260 that he will inform that I will have to do it myself."

Did you make any statements that would lead Mr. Heikkinen to gather that impression from you?

A. No, I did not.

The Court: After the defendant obtained a copy of the order of deportation, which directed him to leave the country within six months, what steps should he—would he be required to take in order to leave the country?

The Witness: Following the instruction—

Mr. Essin: If the Court please— If your Honor please, I will object to that question as calling for a legal conclusion.

The Court: Your objection is overruled. This is a man in the Service. That is his occupation. He can enlighten this Court and jury on what steps the alien would have to take in order to remove himself from the country— if you know?

The Witness: Yes, I know.

The Court: Tell us.

The Witness: No matter what he thought of my visit of April 21st—

The Court: I don't care anything about that— Wait a minute.

261 Tell us what steps he would have to take. He would have to buy a ticket out of the country?

The Witness: Yes.

The Court: He would have to obtain permission from some country to enter, wouldn't he?

The Witness: That's right.

The Court: What do you call that?

The Witness: He should have made application for travel documents, a passport, or an identification document of some kind which would be valid for travel to some country out of the United States.

The Court: All right. Tell us what else, if anything.

The Witness: And on obtaining such a document, whatever it was, tell us, the Service, he was under parole at the time, that he had such a document.

The Court: Where would he obtain those travel documents?

The Witness: I—

The Court: Well, he would first have to have permission to go into Finland, or to enter Canada, if he wanted to go either place, shouldn't he?

The Witness: He should have tried the nearest
262 representative of the Government of such country as he wanted to go to—

The Court: Who obtains that? Who obtains that? Doesn't he?

The Witness: Yes, he does.

The Court: What is that?

The Witness: He himself should have obtained it.

The Court: Yes. There wasn't any duty on your part to obtain that for him, was there?

The Witness: No, I couldn't.

The Court: Or on the part of the Government?

The Witness: No.

Mr. Rapp:

Q. I ask you whether you recall this question?

"Didn't Mr. Maki of the Duluth immigration office merely interview you at that time to execute an immigration form with which the Immigration and Naturalization Service was proceeding, independently of any efforts of yourself, to deport you from the United States?"

"Answer: No, this was not the understanding. Mr. Maki told me at first he will write to Canada and find out whether they will accept me because my last citizen-ship was Canadian. Mr. Maki stated that it would take about two months to get the official answer from there. Then he stated he has started to a correspondence with the Consul General of Finland in New York and if he does not succeed to get an affirmative answer then it will befall upon me to apply personally, to make an application for a visa to Finland. That was the essence—we had a lengthy discussion."

Do you— In your April 21st visit with Mr. Heikkinen, do you recall stating that you would write to Canada and find out whether they would accept him?

The Witness:

A. I know very well that I said no such thing. I was in no position to write such letters.

Q. Did you make any statements that it would take about two months to get an official answer?

A. No, I don't think so.

The Court: You don't think so. Did you say so?

The Witness: I don't recollect, your Honor.

Mr. Rapp:

Q. Did you then state that you would have to correspond with the Consul General of Finland in New York?

The Witness:

A. No, I didn't say so.

Q. And that if you failed, then it would befall on him to make, to apply personally?

A. No, I didn't say that.

The Court: Did you make any attempt to correspond with any official in Canada or Finland with reference to this?

The Witness: No, sir. No, none whatsoever. It just wasn't my job.

Mr. Rapp:

Q. At that time did you know about the deportation proceedings pending against Mr. Heikkinen?

The Witness:

A. I knew he was under proceedings. I knew nothing much more than that about it.

Q. Was it a case that was assigned to you?

A. No.

Q. Was there any conversation, other than your attempting to get the information to fill out this form—with Mr. Heikkinen?

A. Yes, there was some conversation which was almost immaterial—it was immaterial, I know.

265 Q. Did it pertain to the deportation proceedings or his leaving the country?

A. No, it was about smelt fishing.

The Court: About what?

The Witness: About smelt fishing, which was in progress at that time.

Mr. Rapp:

Q. Approximately how long were you with Mr. Heikkinen on that occasion?

A. Forty-five minutes, approximately.

Q. That was in his office in Superior, Wisconsin?

A. Yes.

Q. And you had gone there by prior arrangement, or not?

A. No prior arrangement of any kind.

Mr. Essin: Objection— Hold it, please, Mr. Maki. The question is leading.

The Court: What is that?

Mr. Essin: I say the question is leading. I object to it.

Mr. Rapp: I will withdraw the question.

Q. State whether or not it was by prior arrangement that you went to see him?

The Witness:

A. No, I made no prior arrangement of any kind.

266 Mr. Rapp: That's all.

Cross-Examination by Mr. Essin.

Q. Mr. Maki, you have been employed by the Immigration and Naturalization Service since about 1940?

A. That's right.

Q. And in 1952 you were, as you are now, an Immigrant Inspector, is that it?

A. That's right.

Q. Now, did I understand you to say that the first time you saw Mr. Heikkinen in connection with this case—disregarding that eye-glass situation, which had nothing to do with it—was April 18th or thereabouts, of 1952? Is that it?

A. That's right.

Q. And as far as you can recollect the exact date when you saw Mr. Heikkinen for that first time in connection with his case was April 21, 1952?

A. That's right.

Q. At that time, in 1952, in April, who was your superior officer, that is, in charge of the office where you worked?

267 A. Harry Gordon.

Q. And that was the Mr. Gordon who testified yesterday, is that it?

A. That's right.

The Court: Your office was in Duluth, Minnesota?

The Witness: That's right, sir.

Mr. Essin:

Q. And about when did he tell you to see Mr. Heikkinen, at that time, in April?

The Witness:

A. At what time did I receive my instructions from Mr. Gordon?

Q. Yes.

A. On April 18th, 1952.

Q. I see. And then, within a few days thereafter, you went to see Mr. Heikkinen, is that it?

A. That is correct.

Q. Now, did you write to him, or call him, telephone him, to tell him you were coming?

A. I did not.

Q. And you went right to the place where he works in Superior to see him on the day, which you believe would be April 21st, is that right?

268 A. I did it actually, Mr. Essin, returning from a job I had to do in another part of Superior. I merely stopped to see if I found him, and I did interview him on my way back.

Q. Yes, that is what I mean. You just dropped in to see him that day?

A. That's right.

Q. And you told him what the nature and purpose of your visit was on April 21st, is that it?

A. That is right.

Q. Now, did you have the form with you, that is, a questionnaire form with you which Mr. Gordon had instructed you on?

A. Yes.

Q. You had a blank form with you?

A. I had a blank form with me.

Q. And you told Mr. Heikkinen on that day, April 21st, that you wanted to ask him some questions in connection with that form, which is called "Passport Data for Alien Deportee." Is that right?

A. That is right.

Q. Did he refuse to cooperate with you in any way?

A. Oh, no, he didn't refuse.

Q. He cooperated with you fully, is that it?

269 A. Yes.

Q. Now, did you talk there in his office, or did you go out in the street, or where did you?

A. All the information regarding the Passport Data form was done right in his office.

Q. I see. Now, at any time did Mr. Heikkinen on that 21st of April, when you saw him, tell you that he would refuse to go, to leave this country and go to another country?

A. No, he didn't say that.

Q. Now, did I understand you to say in direct examination, Mr. Maki, that when you first explained your purpose to Mr. Heikkinen, when you saw him on April 21st, that it was with a view for obtaining a travel document for his case? Is that right?

A. Yes.

Q. Now, by that you meant that the Government would do something about trying to get travel documents, is that right?

A. No, I don't think I said that we were going to. The information that I was—

Q. I am sorry, Mr. Maki, you misunderstood my question—

The Court: Let him answer. Go ahead.

The Witness:

A. (Continuing.) —that I was to obtain the information to send, for us to send to Chicago, where it would be considered for that purpose, Mr. Essin.

Mr. Essin:

Q. That is what I mean.

A. Yes.

Q. That is what I was asking you about, Mr. Maki.

A. Yes.

Q. I didn't ask you whether you personally were going to do that. Then, just to have a clear picture in my own mind, Mr. Maki, of what you explained to Mr. Heikkinen was the purpose of your visit, when you made that explanation to him, you had him understand that it was for the purpose of somebody in the Government possibly obtaining travel documents for him. Is that right?

A. That is right. That's correct.

Q. Now, Mr. Maki, as you explained when the Judge asked you a question, ordinarily when a citizen wants to get a passport so that he can travel out of the country, he does that himself. Isn't that right?

A. Yes.

Q. Now, in reference to aliens leaving the country, and particularly with reference to those who are under deportation proceedings, while you yourself may not have done it, isn't it true that the appropriate Government
271 Agency, such as various officials of the Immigration and Naturalization Service, will themselves on behalf

of the Government arrange for and secure travel documents for aliens facing deportation? Isn't that right?

A. Yes, that's right.

Mr. Rapp: May it please the Court—

Mr. Essin: Just a moment.

Mr. Rapp: May it please the Court, I have an objection to interpose to that question.

The Court: He has already answered.

Mr. Rapp: It does not relate to this particular case. And what the circumstances or facts are with reference to another type of deportation proceeding is not material in this particular case.

The Court: Well, I think that objection is well taken, but I will let his answer stand.

Mr. Essin:

Q. And your answer was what?

The Witness:

A. That is true.

The Court: Now, what is true? Just tell us what your answer is, now.

272 The Witness: That in—that I know of my own personal knowledge that in some deportation cases, I have had to handle, the Service in Chicago has obtained for our use documents to effect someone's deportation.

The Court: For your use?

The Witness: For the use of our Service, that is.

The Court: Yes?

The Witness: That is, we have asked and obtained—

The Court: What, for instance, would you obtain?

The Witness: For instance, in sending a Canadian boy back to Canada, we have to ask—our Service in Chicago asks Ottawa for permission to return a Canadian home, and they won't do it until we establish with them that he is a Canadian. The RCMP makes investigation to find out if he is a Canadian, if he is admitted from Canada; they will send us a letter authorizing us to bring him to the border and turn him over to any Canadian immigration officer. That is his travel document.

273 The Court: What was done in Heikkinen's case?

The Witness: I don't know, no. I don't know, sir.

The Court: What did you do? Anything, more than obtaining the information?

The Witness: Nothing beyond obtaining this data.

The Court: Go ahead.

Mr. Essin: Now— May I proceed, your Honor?

The Court: Go ahead.

Mr. Essin:

Q. Now, Mr. Maki, you were not given any instructions to obtain travel documents on behalf of Mr. Heikinen, is that it?

The Witness:

A. I was not given any instructions to do that.

Q. But that does not mean that it wasn't possible for somebody else in the Service to have been given instructions to obtain travel documents, is that right?

A. That's right.

The Court: Did the defendant request you to obtain those travel documents for him?

The Witness: No, he did not.

274 Mr. Essin:

Q. Now, in answer to a question asked you by the Judge, I think you used some initials in reference to a description of an agency, did you not, in reference to a case involving the boy whom your agency had—

The Witness: RCMP— Excuse me.

Mr. Essin:

Q. Would you explain that?

A. When we have a Canadian boy under deportation proceedings in Duluth, we proceed with the proceedings, inform our Chicago office to send a personal history data form, an I-217, down to Chicago. The District Director writes a letter to Ottawa, requesting permission—to Ottawa, sometimes to Winnipeg, sometimes to British Columbia, depending on what is the nearest to that boy's home, so far as we know. I understand from the Canadian Immigration officials themselves that that letter authorizing us to return that boy to Canada is not prepared by anyone in the Canadian Government until the Royal Canadian Mounted Police or other Divisional police officers or other investigative bodies in Canada have investigated around the boy's home, his father and mother, his family, and all elsewhere, to obtain actual positive proof that
275 he is a citizen of Canada.

Q. And that letter, once it is received, constitutes a travel document for the boy to go across the border, is that it?

A. That's right.

Q. Now, with reference to Mr. Heikkinen, from your own knowledge and experience as Immigrant Officer, or with any other alien facing deportation, it is true, is it not, that no alien is permitted to leave the country unless there are travel documents in existence for him to go to a specified country?

Mr. Rapp: Please the Court, I object to that, because it isn't pertaining to this particular case.

The Court: Objection sustained.

Mr. Essin: Your Honor, may I suggest that there was a specific question asked in direct examination of Mr. Maki? I am not certain, but I believe it was asked by the Court, and that is whether or not an alien can just leave the country. And I was trying to get clear—

The Court: Whether an alien can what?

Mr. Essin: Can just leave the country without travel documents, and that was my understanding of the 276 question.

The Court: Yes, there was some information to that effect.

Mr. Essin: I am trying to get a clarification of that particular question.

The Court: Let me ask you this: If an alien—if this Heikkinen was ordered to leave this country, I asked you this before, what steps would he have to take? He would have to, of course, make his reservation on a boat or plane to leave, wouldn't he? He would have to get permission if he was going to Finland, permission from Finland to enter it?

The Witness: That is right, sir.

The Court: Would he have to have anything else in the way of travel papers?

The Witness: No, not that I know of.

The Court: And who, ordinarily, who would obtain it? Would Heikkinen be required to obtain this visa or permit to enter Finland himself, or would the Government—would the Government obtain it for him?

The Witness: Heikkinen—

The Court: You ought to know.

The Witness: I know that Heikkinen—

277 The Court: What is that?

The Witness: I know that the defendant should have, in the circumstances he was in, should have made application for travel documents. I don't want to speak for my Service. I don't know what my Service's obligation is in that regard.

The Court: You ought to know something about your Service. How long have you been in it?

The Witness: Approximately 15 years, but I don't know that we are under any obligation—

The Court: You ought to understand some of the fundamental elements of your work.

The Witness: But I was not under any obligation to obtain those documents.

The Court: No, I am trying to ask you—I am trying to find out from you whose duty was it to obtain those travel documents? Heikkinen's, or the Government's?

The Witness: The defendant's as far as that goes.

The Court: Why don't you say so? That is what I have been trying to find out from you.

Mr. Essin:

Q. Mr. Maki, after April 21, 1952, you don't know
278 what efforts Mr. Heikkinen made to obtain travel documents, do you? Of your own knowledge?

The Witness:

A. Of my own knowledge, for the year—~~for~~ approximately a year following April 21, 1952, I do not know what he did, if anything.

Q. Now, in reference to a question asked you by the Court, when I believe that the Court said in the case of Heikkinen he would have to get first, his transportation; and you answered "Yes" to that. And then you stated, then he would arrange for his travel documents. Well, as a matter of fact, no transportation services, such as a steamship line or an airline, involving travel across the border, will sell reservations or space unless the person who wants to travel has the necessary travel documents to enter the foreign country. Isn't that true?

A. I don't know that that is true, Mr. Essin.

Q. You just don't know.

A. I don't believe it is always true, either.

Q. But you don't know?

A. No.

The Court: In order to enter another country, he would have to have a passport to that country, 279 wouldn't he?

The Witness: It depends on what country, sir? I know that there are—

The Court: Well, just tell us what countries he wouldn't have to, outside of Cuba or some of the—I am talking about some foreign country. If you want to go to Europe, or any part of Finland, wouldn't he have to have a passport? I am not talking about Mexico, Cuba or Canada.

The Witness: If it please the Court, you are asking me to answer a question that only the representatives of each foreign nation can answer, what their own requirements are.

The Court: You had better find out some general information—every ordinary person has an idea, an understanding or a belief, at least, that you have to have a passport to travel in another country. I don't know—maybe I am wrong.

Mr. Essin: I believe the jury—is the jury still looking at that form? (Exhibit returned to Mr. Essin).

Thank you.

Q. Now, Mr. Maki, to go back again to the matter 280 of the passport data for alien deportees, which is Ex-

hibit No. 9, and concerning which you saw Mr. Heikkinen on April 21, 1952— Now, at that time you ascertained from him that he was born in Finland. Is that right?

A. Yes, if that is in the passport data, that's exactly what I did.

Q. Now, at that time or subsequently, did you know whether he had any status as a Finnish subject?

A. No, I didn't know.

Q. You didn't know. And at that time also—that is, I am referring to April 21, 1952, when you saw Mr. Heikkinen, your knowledge concerning his case was that whether or not he was still a citizen of Canada had not been verified? Is that right?

A. I believe that's correct.

Q. So that it was possible at that time, based on the information you had, that Mr. Heikkinen was in fact stateless. Isn't that right?

A. No, I didn't know his standing.

Mr. Rapp: Please the Court, I object to that question as asking for a conclusion from this witness.

The Court: He said he didn't know his standing.

281 Mr. Essin:

Q. Now, Mr. Maki, what exactly did you tell—if you can recall the words you used—Mr. Heikkinen on April 21, 1952, when you explained the purpose of securing the information required on this Exhibit No. 9?

The Witness:

A. I said to Mr. Heikkinen that I had been instructed to come to Superior to interview him. That I had been asked—told to ask him whether he will furnish personal—personal history, which I was to report on a Passport Data form, a copy of which I had taken with me. That if he were willing to do so, that I was to record the information on that Passport Data form, bring it back to Duluth, type it up in the usual normal fashion in several copies, and to return it to Mr. Gordon, the man who instructed me to do that.

Q. And did I understand you to say that this information which Mr. Heikkinen would give you, and which he did give you, would be used by the Immigration Service—not by you because it would be returned to Mr. Gordon when filled out—but it would be used by the Immigration Service in connection with getting for Mr. Heikkinen travel documents?

282 A. I told him that the information would be forwarded to our Chicago office, and that it would be used in that office in considering where it—whether they could make application or attempt to apply or secure a travel document. It was intended to be used, if possible—considered in attempt to try to get a travel document for him.

Q. Did you refer to any particular country in view that the District office in Chicago would use that information supplied, to get a travel document?

A. No, I didn't say so. Because, up until that point, I knew nothing about his citizenship status. I couldn't have said anything to him. I knew nothing of his case.

Q. So that the understanding left with Mr. Heikkinen was that, from supplying the information which you were going to ask him for, and which he fully cooperated with you on, this information would be referred to higher and

other authorities in the District in the Immigration Service, and they would use this information in connection with getting travel documents for Heikkinen. Is that right?

A. Uh huh. Yes, of course.

The Court: Just what do travel documents consist of?

283 The Witness: A travel document in this instance could have been, consisted of an identity certificate.

The Court: A what?

The Witness: Of a certificate of identity issued by the Finnish Government, which would have been—might have been valid for travel from the United States to Finland.

It could have been a number of other documents.

It could have been a valid Canadian passport.

It could have been a valid passport issued by the Government of France. It could have been anything—that some country was willing to issue us, if we had been able to—

The Court: It could have been a document identifying the alien, and it could have been a passport. Could it be anything else?

The Witness: Generally, loosely, or some other travel document—

The Court: What would that other travel document be? That is what I want to know.

The Witness: A certificate of identity.

The Court: I mentioned that—a certificate of
284 identity, obtained from Finland; a certificate of identity from Finland, where he was born. And a passport. Now, what else?

The Witness: I don't know how many other types there are, your Honor, because they are issued by foreign Governments, your Honor—

The Court: Would it have been anything else besides a passport or a certificate of identity? You have been in this business long enough, it seems to me you ought to know.

The Witness: If it please the Court, I have seen a few issued by certain South American countries, for example—

The Court: What are those?

The Witness: I can't read what it says on there. They are in foreign languages, and I don't understand them. I can't read them. I know they are not passports, because

passports are a certain type, certificates of identity are something else, but if they are written in a foreign language you don't know what this instrument is that they issue.

The Court: Are they identified as anything in your work?

285 The Witness: Travel document, is what we have usually called them, because I don't know exactly what is the nature of the instrument issued for Japan, for example—

The Court: All right, say he is going to Finland. What would his travel document consist of?

The Witness: They could have issued him either a passport or a certificate of identity.

The Court: Would there be anything else required?

The Witness: Nothing else would be required.

The Court: And could he have obtained that without his application going through this Government agency?

The Witness: I don't know that.

The Court: What?

The Witness: I don't know that.

The Court: You had better get a book and find out something about your business.

Mr. Essin: I have no further questions, your Honor.

The Court: That's all.

(Witness excused.)

286 Mr. Rapp: The Government rests.

Mr. Essin: Your Honor, at this time I would like to offer some motions.

The Court: The jury may be excused.

(Thereupon the jury retired from the courtroom, and the following proceedings were had between the Court and counsel, out of the presence and hearing of the jury:)

Mr. Essin: May I have just a few moments to line up my notes, your Honor?

The Court: We will take a fifteen minute recess.

Mr. Essin: That will be agreeable to me, sir.

(After a short recess, the proceedings in the absence of the jury were resumed as follows:)

(Motions on behalf of the Defendant at the close of the Plaintiff's case:)

Mr. Essin: If it please the Court:

At this time I would like to, on behalf of the defendant, offer some motions in connection with the proceedings had up to this point.

First, I would like to, and do on behalf of the defendant, renew his motions to dismiss—motions, plural, 287 to dismiss the indictment on the grounds heretofore given; and I would like to state one additional ground which is being offered here for the first time. Now, I would also like to set forth to the Court why it was not possible for us to state this ground before, this additional ground before this time.

On the hearing had on preliminary motions on November 8th, in reference to the pre-trial discovery of documents, the Court made certain rulings, some of which were adverse and some favorable to the defendant. When I received the transcript of the proceedings of that day—I am sure it was inadvertent, however, what I did receive of the transcript of the hearing the record of the hearing did not include any reference to some of the rulings of the Court, made in the latter part of the proceedings of that day. My notes, which were admittedly very sketchy that day—

The Court: I don't know what your notes are, but I go by the transcript of the reporter. The reporter here gets every word that is said in this courtroom—

Mr. Essin: I understand that, your Honor,—

The Court: If there is any conflict between your 288 notes and the reporter's transcript, the reporter's transcript will control.

Mr. Essin: I am sure it was inadvertent, and I am sure that it will be corrected in due time. The point is, at that time, when my notes disclosed that there had been further proceedings—

The Court: Any proceedings had in this court in this matter have been in the presence of the reporter, and have been reported by him.

Mr. Essin: Your Honor, I am not raising that as an issue—

The Court:—What are you talking about, then?

Mr. Essin: I am trying to point out that, until yesterday, in the proceedings in chambers on the record, where I had a verification from Mr. Rapp, U. S. Attorney, on those proceedings as to whether my notes were correct, that certain matters had been taken up and had come on before

the Court on November 8, which were not included in those minutes—and I say again—

The Court: In what minutes?

Mr. Essin: (Continuing)—of November 8, not the minutes, I am sorry, the transcript of the record of the November 8th hearing. And at that time his thinking, and he so stated in the record, coincided with mine—that is, that ~~in~~ he made a statement, and he repeated that statement yesterday, and I am not quarreling with him on it. It is just that a statement was made—

The Court: Are you saying now that something was said by you or Mr. Rapp or by the Court that was not included in the reporter's transcript?

Mr. Essin: Those that I received of November 8th. Now I took that up with the reporter informally, and I feel confident that it is in his notes, but I just didn't get it as yet.

The Court: Oh, I see.

Mr. Essin: I want it prior to hearing—

The Court: What is it you want?

Mr. Essin: Now, the ground that I am furnishing now, that I couldn't put into concrete shape until today because I had no verification of those further proceedings on November 8, was that there was nothing submitted to the Grand Jury before it handed up its indictment in reference to this case—nothing by way of evidence to show whether or not there was a valid order of deportation entered.

The Court: No. As I understood Mr. Rapp yesterday, as to the proceedings before the Grand Jury, he said there was no reporter present, but he didn't say there wasn't any evidence submitted to that Grand Jury which the Grand Jury could find an indictment.

Mr. Essin: No, I am not saying that, your Honor. All I am saying is this: That at the prior proceedings it was clear from the record that what had been presented to the Grand Jury—because I specifically asked if there were any additional documents, we would like to have the Government produce them. And Mr. Rapp said there were no additional documents.

The Court: All the Grand Jury had to know, I presume was that the order of deportation was entered, and that he hadn't left the country within the six months, or hadn't made any application for travel documents; and there was reasonable cause to believe that he hadn't left the country,

or hadn't made application for travel documents; and with a showing of that kind they were justified in indicting him.

Mr. Essin: It is our contention, your Honor, that the mere document itself, without any evidence before the Grand Jury as to whether there was a valid document there, is not sufficient on which to hand up an indictment.

The Court: Well, the presumption is that there was evidence submitted to that Grand Jury upon which 291 they found the indictment.

We are not going into the minutes of the Grand Jury now. He has been indicted by the Grand Jury, and the presumption is that there was valid and sufficient evidence to sustain that, presented to the Grand Jury, upon which they found their indictment.

Mr. Essin: Your Honor, I would like to refer to a matter which is now before the Supreme Court on what I believe is the very same issue; and that is Frank Costello versus the United States of America, it is Case No. 72 before the Supreme Court. That is on a petition for a writ of certiorari to the Second Circuit Court of Appeals, and the Supreme Court granted certiorari. The matter I do not believe has yet been heard—it could not, I don't believe, possibly have been heard because certiorari was only granted on October 10th of last year. And the specific issue which the Supreme Court will hear is—and I quote:

“May the defendant be required to stand trial and his conviction be sustained where only hearsay evidence was presented to the Grand Jury which indicted him?”

And it is the contention of the defendant that, in the absence of any supporting evidence to support the 292 order of deportation—and if such evidence, supporting evidence, such as Exhibits 1 and 2 which this Court reviewed—if such evidence—

The Court: You don't need any documentary evidence, other than the order of deportation. To support that, all you need is testimony that he never left the country within the six months period. That would sustain the indictment, Count 1. And on the second one, some proof that he hadn't made any application for travel documents which support Count 2.

Mr. Essin: But, your Honor, mere failure to leave the country itself—

The Court: What is that?

Mr. Essin: I say mere failure to leave the country within a specified period, either under Count 1 or Count 2, just

mere failure is not a violation of the law. It must be a wilful failure and refusal.

The Court: I don't know what testimony was before that Grand Jury, and you don't know.

Mr. Essin: No.

The Court: But I do know the Grand Jury indicted this man; and the presumption is there was sufficient evidence to support that indictment. Now, we won't spend any more time on that.

293 Mr. Essin: However, I am offering it as an additional ground for dismissal, in addition to those previously offered for dismissal of the indictment.

The Court: And your motion to dismiss the indictment, including that additional ground, is denied.

Mr. Essin: The next motion which I am offering is a motion for judgment of acquittal.

And I will ask the pleasure of the Court, whether it wants me to go into an extended argument on it?

The Court: No. The Court is familiar with the testimony so far, and your motion is denied.

Mr. Essin: I understand, then, that the Court does not want to hear arguments on my second motion?

The Court: No, I don't think so. It is so clear to me that the evidence here so far established convinces the Court that he did not leave the country within the six months period, and he did not make the application for the travel documents. There is sufficient evidence here to sustain a finding of the jury to that effect, if they find one.

Mr. Essin: Well, of course, the second basis for a motion for a judgment of acquittal, and it is the basis that
294 we press for, in addition to the evidentiary basis, is that there was insufficient legal basis under the law for sustaining a verdict of guilty, and there is insufficient reasonable evidence—I am sorry, strike that. There is insufficient substantial evidence to raise the issue of whether or not there was a reasonable doubt created by the evidence which has been submitted now.

The Court: No. It is just as clear as crystal to this Court, and I think it is to the jury, and there is ample evidence here to sustain the finding by the jury, if they so find, that he is guilty on Count 1, and would be guilty on Count 2, and giving it the—giving the most favorable construction of the evidence to the defendant. The Court is satisfied that your motion for acquittal should be denied, and it is denied.

Mr. Essin: Now, I understand that the Court has denied the motions as to the first premise or proposition raised by the defendant: That there was no sufficient admissible legal evidence—

The Court: That what?

Mr. Essin: That there was no sufficient evidence to take the matter to the jury.

The Court: Oh, yes. I am clearly satisfied that 295 there is sufficient evidence to take this matter to the jury; and if the jury should find him guilty, there is sufficient evidence to sustain that finding.

Mr. Essin: Now, may I go into the second basis—the second ground in support of the motion for acquittal?

The Court: All right.

Mr. Essin: First: We believe—that is, the defendant believes that Exhibits 3 to 6, inclusive—

The Court: What?

Mr. Essin: (Continuing.) —3 to 6—Exhibits 3 to 6, inclusive, were inadmissible because the United States Constitution prohibits for criminal purposes a judicial determination without a jury, that the alien was illegally present in the United States.

And I would like to elaborate on that point to a small extent, if I may.

Now, here is a proceeding which terminates in an indictment, and a trial on the indictment. But the proceeding when first started was a civil proceeding, with entirely different standards; and what has happened in this case?

The Court: There is no need of wasting any time on that. I have reviewed the proceedings on deportation which ended in the deportation order. And if ever a 296 man had a fair trial and a fair hearing, Heikkinen had it. He had every opportunity to employ counsel. He had employed counsel, and for some reason, or other his attorney was trying to delay the proceedings, and the Government agency handling this hearing continued the case—I think at one time for about three weeks to give him an opportunity to employ counsel. He steadfastly refused to employ counsel. Notwithstanding that fact, they asked him if he wanted to cross examine the witnesses, and he stood there. He was in court. He was at that hearing. He was present when this Professor testified that he was over there and attended the same school; and he heard that Professor testify that they were taught over there

that the first thing to do in a revolution was to destroy—the first thing to do in the destruction of our Government was to take possession of the police department and the fire department and of all our utilities and all of our industries. He heard that, and he didn't make any denial of it before this hearing. He had a very fair hearing, if any man ever had. So I won't spend any more time on that.

Mr. Essin: Your Honor, there are two issues involved there—if I may go into them for just a moment:

297 First is the issue of counsel; not having counsel, and—

The Court: He had counsel, and he had opportunity to employ counsel; and he employed counsel in Minnesota at one stage of the proceedings.

Mr. Essin: May I comment on that, your Honor? If, however, he has an attorney—as a layman, if I had retained an attorney who was an expert in tax matters—

The Court: There is no need of wasting my time and your time on that. I am satisfied, and I have so ruled, that he had a fair hearing, and that the law was complied with in all respects, and that is all there is to that.

Now, anything else?

Mr. Essin: Let's take the second part of the argument on this particular point, aside from the issue of whether or not he had counsel—and I know the Court has made a ruling—

The Court: I have, yes.

Mr. Essin: Yes, and we won't argue with the ruling—

The Court: The Government doesn't have to furnish him with counsel.

Mr. Essin: He wasn't asking for the Government
298 to furnish him counsel.

The Court: He had every opportunity to do so. If he steadfastly refused to do so, that was his responsibility.

Mr. Essin: Let me go into the other point, if I may—

The Court: What?

Mr. Essin: I would like to go into the other part of the argument, on this phase: Aside from whether or not he had counsel, the other point that I want to make is this:

That entire proceeding, whether valid or not, was a civil proceeding. There was a civil determination. There was an order resulting, an order of deportation resulting from a civil proceeding, with different standards of evidence, different rules of evidence. And yet there is a line drawn.

He doesn't have—the defendant doesn't have a criminal proceeding from the very beginning, before the order is issued—

The Court: The deportation proceeding is not a criminal proceedings.

Mr. Essin: That is what I say.

The Court: It is not a criminal proceeding, by any means.

299 Mr. Essin: And yet, based on standards of a civil proceeding, he faces possible conviction in a criminal trial. That is the issue we are making.

The Court: He had every right that you would have, even in a criminal proceeding. He had the right to counsel. He had the right to cross examine witnesses testifying against him. He had a right to examine the testimony. He had every right that anyone—there was no Constitutional right of his violated in those proceedings.

Now, let's don't spend any more time on that.

Mr. Essin: Well, most of my argument would have consisted of the elaboration of the point of the differences, so I have nothing further to comment in reference to that.

The Court: We have gone over that. Your motions for dismissal and acquittal are denied.

Mr. Essin: The motion for judgment of acquittal is denied, I understand?

The Court: Yes. We will take a recess until two o'clock.

(At 12:00 o'clock Noon a recess was taken until 2:00 o'clock in the afternoon of the same day, Tuesday, January 10, 1956.)

300 (At 1:50 o'clock in the afternoon of the same day, Tuesday, January 10, 1956, the Court and counsel met in the Court chambers, and the following further proceedings were had:)

Counsel Present:

Mr. Rapp,

Mr. McDermott,

Mr. Essin.

Mr. Essin: Your Honor, if it is okay with you, I would like to go over the balance of the proceedings before the matter is concluded.

The Court: Go ahead.

Mr. Essin: So that I will be clear in my mind.

The Court: First, your motion to dismiss the indictment has again been denied.

Your motion for judgment and acquittal has been denied.

Now, is there anything further?

Mr. Essin: Yes.

First, I have been checking my notes on what I said on the argument. I just want the record to be clear on what

I have said. And it appears that I hadn't completed
301 my own sentence when I cited the case Costello versus the United States. And all I want to say in that connection for the record is that it is the contention of the defendant in support of his additional ground for the dismissal of the indictment that a defendant may not be required to stand trial, and a conviction should not be sustained, where only hearsay evidence was presented to the Grand Jury which indicted him.

You see, in checking the notes, I find I had not been able to finish that statement.

The Court: Yes.

There is nothing in this record—there is no proof, no evidence, as to what evidence was submitted to the Grand Jury, upon which the Grand Jury based its finding and presentment of the indictment. Ordinarily, the proceedings before a Grand Jury are secret, and not a matter that is available in a case of this kind—or in any criminal case.

Mr. Essin: I am not trying to argue it, but simply to explain what our position is, your Honor.

The Court: Have you any proof there was only hearsay testimony submitted to the Grand Jury? No. You don't have it. No one else has it.

Mr. Essin: Your Honor, Mr. Rapp made a statement, and I am not disputing what he said, in reference to the argument on the motion—

The Court: What did Mr. Rapp say about the evidence that was presented to the Grand Jury?

Mr. Essin: He said that what was presented—because we had requested whatever documentary proof had been presented, and he enumerated the number of documents by name which had been presented. He did not include those. It is my belief—

The Court: Mr. Rapp was not the United States District Attorney who presented this case to the Grand Jury. As I understand, that was prior to your taking office?

Mr. Essin: That I know.

Mr. Rapp: It was done by Mr. Nikolay, Judge, and my statement was to this effect—

The Court: Mr. Rapp knew nothing about what transpired before that Grand Jury, any more than you or I.

Mr. Rapp: That was my statement, and that I had not been able to locate any documents which had been presented to that Grand Jury. I don't know what was presented to them. I have no knowledge.

Mr. Essin: You see, your Honor, my point is that—

The Court: He says he doesn't know, and you can assume, I suppose, that any documents may have been presented to the Grand Jury and returned to the file of the District Attorney.

Mr. Rapp: That is correct.

The Court: There is no evidence of any hearsay testimony that was presented to the Grand Jury, and there is no proof of it. You haven't any proof of it.

Mr. Essin: Your Honor, we have to—that is the defendant has to draw certain assumptions. And from the fact that Exhibits 1 and 2 in this trial had not been presented to the Grand Jury—

The Court: How do you know they haven't been? You don't know anything about what transpired before that Grand Jury. Mr. Rapp doesn't know what transpired, I don't know what transpired before that Grand Jury. There was no reporter present.

Mr. Essin: But, your Honor, on the hearing for pre-

trial discovery, part of the motion asked for documents which had been presented. Mr. Rapp enumerated the documents that had been presented, and stated for the record there were no other documents.

The Court: If he did, he didn't know.

Mr. Rapp: To the Grand Jury? I never made any statement with reference to what was presented to the 304 Grand Jury.

Mr. McDermott: None, with reference to what was presented to the Grand Jury, never.

Mr. Rapp: No, sir, I didn't.

The Court: He certainly couldn't because he wasn't there. He had no more knowledge about it than you yourself.

Mr. McDermott: No.

Mr. Rapp: I didn't enumerate any documents. I said there was no record available. The reporter wasn't present, we couldn't go to his notes, and I wasn't there, so I don't know.

The Court: And the law is that proceedings before a Grand Jury are secret, and the law is also that when a Grand Jury returns an indictment, that it did so upon sufficient evidence. That is all there is to that.

Now, what else do you have?

Mr. Essin: Well, on procedure, now, for the balance of the trial, your Honor: We intend to rest without introducing any evidence.

Now, I have requested instructions to the jury, and if you want to discuss them now, I would be glad to.

305 The Court: Let me have them.

Mr. Essin: Here is a copy for you, Mr. Rapp. (Presenting requested instructions to the Court, and a copy to Mr. Rapp.)

I am sorry, I don't have any copy for Mr. McDermott.

Mr. McDermott: No. That's all right. That's quite all right.

The Court: Let the record show that the defendant's counsel has submitted to the Court now, in the case of the United States of America versus Heikkinen, January 9, 1956, 'Requested Instructions to Jury by Counsel for the Defendant.'

"1. The Court does not give any opinion on the evidence. The Court's duty is to state to the jury what he considers the law to be."

That is elementary.

"2. The mere fact that an indictment has been returned by the Grand Jury is not evidence."

That is the usual instruction I give.

"3. The jury must not draw any inference from the fact that the defendant has not taken the stand."

I give that instruction.

306 "4. If the jury can draw a reasonable inference of innocence, it must find the defendant not guilty."

I give that instruction.

"5. Whether or not the defendant is or was a Communist is not an issue in this trial."

That is right, but—Do you want that instruction?

Mr. Essin: Yes, your Honor.

The Court: The Court will give that.

"6. The jury must judge an alien no differently than it would judge a citizen of the United States."

I think that's fair.

"7. The mere presence in this country of an alien is not evidence of guilt."

Is not evidence of guilt? I can't go along with that.

Mr. Rapp: Well, guilt of what?

The Court: That is very positive evidence, if he is here a year after he should have left. No, I can't give that.

Mr. Essin: Your Honor, we are concerned with a statement as to the mere presence—the fact that he is here.
307 That is not evidence of wilful failure to comply with the law.

The Court: To me, it would be evidence of his guilt. He is here. The six months have long expired.

Mr. Essin: Well, there may be numerous reasons why he should be here, which are all legal reasons for his being here. May I cite an example?

The Court: (Reading.) "The mere presence in this country of an alien is not evidence of guilt."

It is not proof of his guilt, but it is evidence.

Mr. Essin: Do I understand—

Mr. Rapp: I certainly think it is evidence.

The Court: What is that?

Mr. Rapp: I certainly think it is evidence of his guilt. It may be considered.

Mr. Essin: May I cite an example, your Honor?

The Court: Yes.

Mr. Essin: Let us assume an alien has been ordered

deported, and within the six months term he applies to Finland or to Canada, and he gets a negative response. He can't go there. So he is still here. Now, the mere evidence of his presence here, the mere fact of his presence here is evidence of his guilt under those circumstances?

308 Mr. Rapp: Guilt of what?

Mr. Essin: Well, of violation of the law.

The Court: It is evidence of his guilt, that he hasn't departed within the six months. It may not be proof of his failure—

Mr. Rapp: To apply for travel document.

The Court: It may not be proof of his failure to make a reasonable effort to obtain travel documents.

I will rest on that. Right now, I will say I will refuse that.

(And the Court refused to give said 7th requested instruction on behalf of the defendant, but marked the same: “#7 refused.”)

The Court: (Reading.)

“8. The burden of proof in a criminal case, such as this, is upon the Government.”

That is correct.

“9. The Government must establish its proof beyond a reasonable doubt.”

That is correct.

“10. In a criminal case the defendant is presumed to be innocent. This presumption of innocence must be disproved by the Government by proof beyond a reasonable doubt.”

309 That is correct.

“11. The mere failure to depart from this country within six months, or to make timely application for travel document, is not a violation of the law. There must be a wilful failure and refusal to depart within six months or to make timely application for travel document.”

That's correct.

(The Court modified said 11th requested instruction, to read as follows:)

“The mere failure to depart from this country within six months, or to make timely application for travel document, is not a violation of the law. There must be a specific intent to violate the statute and a wilful failure and refusal to depart within six months or to make timely application for travel document before there can be a violation of the statute involved in this case.”

The Court: (Reading.)

"12. There must be a specific intent to violate the statute."

I think that is correct.

"13. Wilful intent must be proved by facts and circumstances. It cannot be presumed."

310 That is correct.

"14. The Government must prove every element of the indictment."

That is correct.

"15. The statute makes it a crime for an alien who deliberately refuses to leave this country and there is another country which will lawfully admit him. This law does not apply to an alien when there is no country which will lawfully admit him."

"The statute makes it a crime for an alien who deliberately refuses to leave this country"—

Mr. Rapp: I object to that.

The Court: Just wait a minute. Just let me read these. I haven't finished reading this yet.

Mr. Rapp: Yes, sir.

The Court: (Reading.)

"15. The statute makes it a crime for an alien who deliberately refuses to leave this country and there is another country which will lawfully admit him. This law does not apply to an alien when there is no country which will lawfully admit him."

I don't think I will give that instruction.

Mr. McDermott: No.

The Court: That's refused.

311 (The Court marked requested instruction 15: "15 refused", and refused to give said instruction to the jury on behalf of the defendant as requested.)

The Court: (Reading.)

"16. Under this law the only duties which rest with the alien are:

"(a) Not to conceal his whereabouts after a final order of deportation has been made, and

"(b) To present himself for deportation when asked to do so by the Attorney General of the United States."

That is refused. That isn't the law.

(The Court marked requested instruction 16: "16 refused", and refused to give said instruction to the jury on behalf of the defendant as requested.)

The Court: (Reading.)

"17. An alien is entitled to rely on counsel and to have counsel represent him at every stage of the deportation proceeding which may result in his eventual deportation. He is entitled to be advised of such right. The alien is entitled to be advised of his right to counsel in any proceeding, 312 formal or informal, which may result in a criminal prosecution of that alien."

And in this case he was advised, and he had every opportunity to be represented by counsel. That will be refused, because there is nothing in this evidence which shows that he wasn't permitted to have counsel.

(The Court marked requested instruction 17: "≠17 refused" and refused to give said instruction to the jury on behalf of the defendant as requested.)

Mr. Essin: May I refer to that?

The Court: (Reading.)

"18. Any verdict you render must be unanimous."

That I always give, yes.

Mr. Essin: I would ask the Court to read the rest of that.

The Court: What?

Mr. Essin: What I have there for 18.

The Court: 17?

Mr. Essin: No, I am referring to 18.

The Court: What is it? (Reading.)

313 "Any verdict you render must be unanimous, but you are not required to agree on a verdict."

No, that last part will be stricken.

(The Court modified said 18th requested instruction to read as follows:)

"Any verdict you render must be unanimous."

The Court: They can gather from that, if they don't agree, they can so advise the Court. If they disagree, they can't agree.

Those instructions that you have asked for are all included in the general instructions I give, and perhaps gave the last time, except some which I have objected to and refused.

Mr. Essin: Just to review, without making an argument, just the numbers, your Honor—I take it that those refused are No. 7?

The Court: Well, let's see—

Mr. Rapp: May I point out to the Court that number 7

is really encompassed in number 11, which you have agreed to give?

The Court: "The mere presence in this country of an alien is not evidence of guilt."

Mr. McDermott: Stated in a different manner.

314 Mr. Rapp: It is stated in a different manner.

Mr. Essin: No.

Mr. Rapp: But in essence it is the same.

Mr. Essin: Oh, no.

The Court: I think I can give this:

"The mere presence in this country of an alien may or may not be evidence of his guilt." Change it that way.

Now, what other one? Then 15?

Mr. Essin: In other words, number 7 has been modified by the Court?

The Court: Yes. The instruction you requested had been denied.

Mr. Essin: Yes. That is number 7.

Then number 15 has been denied? Number 16 and number 17 have been denied, and all that part of 18 after the comma has been denied under your Honor's ruling?

Mr. McDermott: 18.

Mr. Essin: I mean 18.

The Court: All except "Any verdict you render must be unanimous" is denied; and that part which is denied is "but you are not required to agree on a verdict."

Mr. Essin: Now, I assume, as at the last, the prior
315 trial in this matter, that the jury will be permitted to leave the court, but I will give my exceptions, if any, to the instructions without the hearing of the jury?

The Court: That's right. I always—the very last word of my instructions reads as follows:

"If counsel have any objections or exceptions, they may make them in the absence of the jury."

That is always done.

Mr. Essin: And, now, on summation, Mr. Rapp and I discussed it informally before we came in, and we thought a maximum of forty-five minutes would be sufficient.

The Court: How much?

Mr. Essin: A maximum of forty-five minutes each.

The Court: Well, take whatever time you like. Both of you take whatever time you like. I am not going to hold you to any particular time. You may take whatever time you like.

Mr. Essin: May I ask Mr. Rapp whether he intends to split his time?

Mr. Rapp: Yes, we will open and close.

The Court: Oh, yes, sure.

Mr. Essin: Oh, one additional point which the Court 316 may want to decide now:

Now, on the trial there were three exhibits, 3, 4, and 5, in which the Court reserved ruling on whether the entire exhibit on each of the three would be submitted to the jury. And I wonder whether the Court intends now—

The Court: I have already ruled on that. They will not be. That portion of the exhibit which relates to the order itself may be read to the jury. Those exhibits will not be sent to the jury room.

Mr. Essin: That is, the entire exhibit?

The Court: But it may be used in the argument to the jury by defense counsel and by Government counsel, that portion which relates to the order of deportation, and that is all that is material.

Mr. Essin: Now, do I understand the Court, then, to say that the part that may be used by counsel is just the order?

The Court: You can pick up that exhibit, and read the order—"Gentlemen of the jury, this is the order that was entered"—and that is as far as he can go.

Mr. Essin: Your Honor, may I take exception to that ruling, on this ground? My understanding of the law is that an order has no effect unless it is accompanied 317 by findings of fact and conclusions of law. Now, the order by itself—

The Court: If you want it all in there, yes, you can have it. If you want the entire exhibit in there with the findings, you may have it.

You are objecting to the exhibit, to the admission of the exhibit. I have admitted it for the eyes of the Court only, except that portion which relates to the order, and that the jury should know.

Mr. Essin: Well, I just want to make my own position—that is, the position of the defendant here, clear.

The Court: Yes, you have made it clear.

Mr. Essin: Now, we do not waive our objections.

The Court: You have objected to the admission of that, and I have overruled your objection.

Mr. Essin: That is right. Now, the question is: What part of this exhibit is going to the jury?

The Court: I have overruled it, with this limitation: That only that portion of those exhibits which relate to the order itself may be read to the jury; and the findings upon which that order is based, I don't think the jury is concerned with that, because I have reviewed the deportation proceedings and I find that that order is based on good and sufficient evidence, period!

Mr. Essin: I have nothing further, I believe. That disposes of those three exhibits.

The Court: Yes. Anything you have in mind?

Mr. Rapp: No, sir.

The Court: All right, we will go in.

Mr. Essin: May I ask this point on procedure?

Now, when the jury comes back, I will state for the record that the defense rests. And then do we go right into argument?

The Court: Yes, surely.

Mr. Essin: All right.

319 (The trial was resumed in the presence and hearing of the jury at 2:20 o'clock in the afternoon of Tuesday, the 10th day of January, 1956, pursuant to recess.)

Counsel Present:

Mr. Rapp, Mr. Essin.

The defendant, Knut Einar Heikkinen, was also present in person.

The Court: You may proceed.

Mr. Essin: If the Court please, the defendant rests.

The Court: Any rebuttal?

Mr. Rapp: No, your Honor.

(The above and foregoing was all of the evidence offered at the trial of said cause.)

320 (Thereupon, following the closing arguments of the respective counsel, the Court gave to the jury the following oral instructions:)

The Court: Members of the jury:

You have heard the arguments of counsel. It now becomes the duty of the Court to instruct you on the law that you will apply to the facts of this case. You will decide this case on the evidence received in this case, and on nothing else. There are two Counts in the in-

dictment involved in these proceedings; and I will read them to you:

The title of the case is:

"United States of America versus Knut Einar Heikkinen.

"The Grand Jury charges:

"Count One"

"1. Defendant, Knut Einar Heikkinen, is an alien who entered the United States at Eastport, Idaho on or about October 1, 1916, from Canada, and against whom an Order of Deportation is outstanding under the provisions of S. U. S. C. 137, said Order having been entered on or about April 9, 1952, by reason of the said Knut Einar Heikkinen having been found in the United States in violation of said Act of Congress in that the said Knut Einar Heikkinen was, after entry, a member of the following class as set forth in Section 1 of the Act of October 16, 1918, as amended (64 Stat. 1006), to wit, a member of the Communist Party of the United States and, pursuant to said Order of Deportation, was required to depart from the United States during the period of six months from April 9, 1952.

"2. During the period of six months from April 9, 1952, and continuously thereafter, the defendant, Knut Einar Heikkinen, did willfully fail to depart from the United States and during said period and thereafter remained in Superior, Douglas County, within the Western District of Wisconsin.

"Count Two"

"1. The Grand Jury re-alleges all of the allegations of Paragraph 1 of Count One of the indictment the same as if the allegations were fully set forth herein.

"2. During the period of six months from April 9, 1952, and continuously thereafter, the defendant, Knut Einar Heikkinen, while in the Western District of Wisconsin, did willfully fail to make timely application in good faith for travel or other documents necessary to his departure from the United States."

The indictment that I have read to you in this case is of itself no evidence of the defendant's guilt. It is a mere accusation, and no juror should permit himself or herself to be influenced against the defendant because or on account of the indictment in this case.

It is, in effect, the complaint; and when a complaint is

filed, then the Government produces its evidence to prove what they claim the indictment alleges.

The statute material in this proceeding reads in parts as follows:

"Any alien against whom an order of deportation is outstanding, * * * who shall wilfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, * * * or who shall wilfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, shall upon conviction be guilty of a felony."

It is a rule of law that a defendant in a criminal 323 trial is presumed to be innocent until he is proved to be guilty, by competent evidence, beyond a reasonable doubt. The defendant is entitled to the benefit of this presumption, and the presumption stands as a sufficient protection unless it has been removed by evidence proving him guilty beyond a reasonable doubt. Upon every reasonable doubt, the presumption arising upon the evidence must be construed in his favor. The burden of proof does not shift to the defendant in a criminal case. The law does not require the defendant to prove by his evidence that he is innocent of the offense with which he is charged. You must be prepared to say, at the conclusion of the evidence, before finding the defendant guilty, that you believe his guilt has been established beyond a reasonable doubt.

A reasonable doubt which entitles an accused person to an acquittal means a doubt which reasonably arises from all the evidence in the case. You should distinguish between a reasonable doubt and one that is not reasonable. A doubt which is merely fanciful, which ignores a reasonable interpretation of the evidence, or arises from sympathy or from fear to return a verdict of guilty, is 324 not a reasonable doubt. A reasonable doubt is one for which good reason can be given, based on the nature or insufficiency of the evidence in the case. Guilt is proved beyond a reasonable doubt when all the evidence fully and fairly considered is sufficient to produce in the mind of an ordinary intelligent and prudent juror the conviction of the defendant's guilt so clearly that he would act thereon without hesitation if it related to the most important affairs of his life.

If the material facts may be fairly reconciled with innocence, a reasonable doubt does then exist. In short, if

the evidence and proper inferences be found by you to be as consistent with innocence as guilt, the defendant is entitled to acquittal.

The law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can be neither justified nor excused on the ground of innocent intent.

Before you may find the defendant guilty on Count One of the indictment, you must be satisfied from the evidence
325 dence beyond all reasonable doubt that he, during the period of six months from April 9, 1952, did willfully fail to depart from the United States.

Before you may find the defendant guilty on Count Two of the indictment, you must be satisfied from the evidence beyond all reasonable doubt that he, during the period of six months from April 9, 1952, did willfully fail to make timely application in good faith for travel or other documents necessary to his departure from the United States.

You are further instructed that an alien who is a resident of the United States, physically present here, may not be deprived of his life, liberty, or property without due process of law. He may be deported, however, for any reason which the Congress by appropriate legislation has determined will make his continued residence in the United States against the best interests of our country.

Therefore, although it may be established that he can be expelled and deported for cause, yet before his expulsion he is entitled to notice of the charge, and to a hearing
326 before the appropriate executive or administrative tribunal. This we call his Constitutional right to due process.

The order of deportation involved in this proceeding was entered after notice to defendant, and a hearing had by the defendant pursuant to statute; and that defendant has exhausted all his administrative remedies. And you are instructed that I have judicially reviewed the deportation hearing and I have found that the defendant was accorded due process, and that the deportation order is valid and effective for all purposes.

He was granted a reasonable period of time after his arrest within which to arrange for the presentation of his case, including representation by counsel. He was given reasonable notice of the nature of the charges against him, to-wit: That at the time of entry he was an immigrant

not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder; and that the Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.

He was given reasonable notice of the time and place at which the proceedings would be held, and was informed of his privilege of being represented by counsel. He had a right to be represented by counsel; and he was so informed. He had a reasonable opportunity to cross-examine the witnesses, and to examine the evidence against him. He had a right of appeal from the order of deportation entered. He did appeal, and he employed an attorney to make that appeal. And the appeal was dismissed, and that order of deportation remained in full force and effect on April 9, 1952.

And, as I have said, I have found judicially that the order of deportation is based upon reasonable, substantial, and probative evidence, and is valid.

Reference has been made by the defendant's counsel to the warrant for deportation of alien, dated April 25, 1952. I say to you that this is a warrant directed, not to the defendant, but to the Officer in charge of the Immigration and Naturalization Service, Duluth, Minnesota; and that the law does not require that this warrant of authority directed to that officer be served upon the defendant,

before the defendant takes the necessary steps to depart from this country, or to make timely application

in good faith for travel or other documents necessary to his departure from the United States; and it is not an issue in this case. Whether the defendant is or ever was a Communist is not an issue in this case.

The jury may judge an alien no differently than it would judge a citizen of the United States.

You are instructed that the words appearing in the statute, Section 156 (c) above quoted, as follows: "travel or other documents necessary to his departure" mean the different kinds of documents that are or may be required by other countries for entry into such countries.

You are instructed that the statute on which this indictment is laid, to-wit, Section 156(c), Title 8, United States Code, the material parts of which I have read to

you, places upon an alien against whom an order of deportation is outstanding, an affirmative duty and an obligation on his part to take specific steps toward effecting his own departure from the United States, and to that end to make timely application for travel or other documents necessary to such departure. It is the alien's willful failure in that regard to fulfill such duty and obligation 329 that is the gist of the offenses here charged.

"Willful" as used in this statute, means an intentional failure and refusal to comply with the order of deportation.

There is no duty on the part of the Government to assist the defendant in effecting his departure. The Government will, if requested, assist him. But the duty devolves upon the defendant to comply with that order of deportation.

As I say, the material parts of the statute I have read to you place upon an alien against whom an order of deportation is outstanding, an affirmative duty or obligation on his part to take specific steps toward effecting his own departure from the United States. In other words, he can't remain idle. He must take the necessary steps to effect his departure from this country within that period of six months. And if he fails to do so, he has violated the law and the statute involved in this case.

The defendant has not testified in this case, and you are instructed that the failure of a defendant to testify

330 does not justify the jury in drawing an inference hostile to him. Under the criminal law, a defendant has the right to testify, or not. If he testifies, he becomes liable to all the tests that all other witnesses are liable to be subjected to. If he does not testify, the jury has no right, in determining the question of guilt or innocence, to draw any inference hostile to the defendant because of his failure to testify.

It is the special duty of the jury to scrutinize and weigh the evidence, and determine upon the credibility of the witnesses. You should, as to every witness, consider his or her appearance and manner of giving testimony; his or her frankness or evasiveness, as the case may be; their interest in the result of the trial, if any appears; their opportunity to know the facts testified about; and all the facts and circumstances appearing on this trial, which either support or discredit the testimony of the witness, and you should give to the testimony of each witness just

such weight and credit as you believe it fairly entitled to receive.

And the weight of the evidence is not to be decided merely according to the number of witnesses on each side.

You may find that the testimony of one witness is 331 entitled to greater weight than that of another witness or possibly of several other witnesses, and you may give it such weight in considering your verdict.

In case you become satisfied from the evidence that any witness has on this trial wilfully testified falsely as to any material fact, you are at liberty, in your discretion, to disregard all the testimony of such witness, except in so far as you find it corroborated by other evidence that is credible.

Members of the jury, this is an important case. It is important to this country, and it is important to the defendant. I know it will receive your conscientious consideration.

You are the sole judges of the evidence and of the facts in this case. It is for you to say what the facts are.

Before you begin your deliberations it will be necessary for you to elect a foreman of the jury, who will sign the verdict you will agree upon.

Your verdict must be unanimous.

The Court has prepared a form of verdict. It reads: 332 "We, the jury, for our verdict in the above-entitled action, find the defendant, Knut Einar Heikkinen:

"As to Count One:"

You will insert "Guilty" or "Not Guilty" as you so find.

"As to Count Two:"

You will write the word in "Guilty" or "Not Guilty" as you so find.

If counsel have any exceptions or suggestions, they may make them in the absence of the jury.

Do you have any?

Mr. Essin: Yes, your Honor.

The Court: The jury may retire. The Clerk will swear an officer.

(Thereupon a Bailiff was duly sworn, and the jury retired in the custody of the Bailiff, to deliberate upon their verdict.)

333 (The following further proceedings were had between the Court and counsel, out of the presence and hearing of the jury:)

Mr. Essin: All right, your Honor?

The Court: Yes.

Mr. Essin: My first exception to the instructions, your Honor—

The Court: A little louder, please.

Mr. Essin: The first exception to the instructions, your Honor.

The Court: Wait a minute. Before any exhibits go upstairs to the jury, keep them here, until we check them over.

All right, go ahead.

Mr. Essin: The first exception to the instructions, your Honor, is the point in which the Court stated:

"I have found that the defendant was accorded due process and the right to counsel," and so forth—beginning at that point, "I have found," up to where the Court stated, "He (meaning the defendant) had a right of appeal." I make exception to that entire part of the instructions.

334 Then, also exception is taken to that part of the instructions in which the Court stated:

"I have found that the order is sustained by substantial, probative"—and the other requirement, as indicated by Section 1252, Sub-section (b), Sub-section (4) as the standard of evidence. Exception is taken to that part of the instructions.

Exception is also taken to that part of the instructions in which the Court stated that:

"The warrant of deportation of alien is not an issue in this case."

Exception is also taken to that part of the instructions in which the Court stated that: Section 156, Sub-section (c) places an affirmative duty upon an alien, and so forth—I couldn't take it down fast enough—and to make timely application—

The Court: Yes?

Mr. Essin: (Continuing.) —the alien to make timely application for travel documents. Up to where the Court used the word "wilful," up to that point, exception is taken.

Then exception is also taken to the instructions of the Court in which it stated that:

335 "There is no duty on the part of the Government to effect alien's departure. In other words, he can't remain idle."

Exception is also taken to that instruction—

The Court: In other words, the defendant cannot remain idle?

Mr. Essin: Yes, sir, that is what I meant.

And exception is taken to that statement.

The Court: Yes, the Court will note your exceptions. There will be no further instructions given to the jury. Now, gentlemen, I think you ought to go through these exhibits and see which should go to the jury.

The Clerk: I have got Exhibits 6, 7, 8, and 9. Those are the four.

The Court: Yes. Anything that pertains to the findings and the order doesn't go to the jury. The others—

The Clerk: That is correct, then. 6, 7, 8 and 9 go to the jury?

Mr. Essin: May I just have a quick look at them?
(Examining exhibits.)

336 Well, the Court has made its ruling on the other exhibits, so that I need not comment on it.

The Court: Yes. All right, we will take a recess.
337 (Thereafter, at 4:15 o'clock in the afternoon of the same day; the following further proceedings were had between the Court and counsel, out of the presence and hearing of the jury.)

The Court: I am going to send the indictment to the jury, seeing that they have requested it.

Let the record show that, in the presence of the counsel for the Government and for the defendant, and in the presence of the defendant, the Court now is instructing the Marshal to present to the jury the indictment for their consideration. I have already instructed the jury that they are not to be influenced by the fact that the indictment has been presented.

You may take that to the jury, Mr. Marshal.

(The Bailiff delivered the indictment to the jury, as requested.)

338 (Thereafter, at 4:35 o'clock in the afternoon of the same day, the jury returned their verdict into open Court; whereupon the following further proceedings were had:)

Counsel Present:

Mr. Rapp,

Mr. McDermott,

Mr. Essin.

The defendant, Knut Einar Heikkinen, was present in person.

The Court: Members of the jury, have you agreed upon a verdict?

If you have, you may hand it to the Clerk.

(Verdict delivered to the Court.)

The Court: You will listen to the reading of the verdict after the title of the case:

"We, the jury, for our verdict in the above-entitled action, find the defendant, Knut Einar Heikkinen:

"As to Count One: Guilty

339 "As to Count Two: Guilty"

Members of the jury, is that your verdict?

Mr. Essin: Please the Court, I move to have the jury polled.

The Court: All right. The Clerk will poll the jury.

The Clerk: Mrs. Pearl Bray: Is and was that your verdict?

Juror Bray: Right.

The Clerk: Mary Reynolds?

Juror Reynolds: Yes, sir.

The Clerk: Arthur Biedermann?

Juror Biedermann: Yes, it was.

The Clerk: Eugene Stuessy?

Juror Stuessy: Yes, it was.

The Clerk: David VanWie?

Juror Van Wie: Yes, sir.

The Clerk: Frank T. Moran?

Juror Moran: Yes, sir.

The Clerk: Alice Forbes?

Juror Forbes: Yes, sir.

The Clerk: Glen Kindschi?

Juror Kindschi: Yes, sir.

340 The Clerk: Annette Blied?

Juror Blied: Yes, sir.

The Clerk: Edward Niffenegger?

Juror Niffenegger: Yes, sir.

The Clerk: Frank Robertson?

Juror Robertson: Yes, sir.

The Clerk: Harris Schultz?

Juror Schultz: Yes, sir.

The Court: Have counsel any motions?

Mr. Essin: I have some motions, yes, sir.

First, your Honor, if the Court please, I would like to move—to make a motion in arrest of judgment in this matter; and would the Court want me to argue it?

The Court: No. Your motion is denied.

Mr. Essin: Then I would make a motion for a new trial. Would the Court want me to argue that motion?

The Court: No. That motion is denied.

Mr. Essin: I have certain further motions to make in reference to a stay of sentence pending appeal, and I don't know whether the Court wants me to make them now or after imposition of sentence.

The Court: Those may be made after sentence is imposed.

341 Mr. Essin: Will the Court set a time for imposition of sentence so that I may—

The Court: I am going to do it right now.

Mr. Essin: I see.

The Court: All right, Mr. Heikkinen, step forward.

(The defendant, Knut Einar Heikkinen came forward as requested.)

The Court: Have you anything to say to the Court before the sentence is imposed? The jury has found you guilty, and of course they couldn't have done anything else under the evidence.

Defendant Heikkinen: Whatever I have to say, it comes through my attorney.

The Court: What is it?

Defendant Heikkinen: Whatever I have to say, it comes through my attorney.

The Court: Do you have anything you want to say now before sentence is imposed?

Defendant Heikkinen: Well—

The Court: What is your answer?

Mr. Essin: If it pleases the Court, what Mr. Heik-

kinen has stated is that whatever he wants to say, it
342 will be said through his attorney.

The Court: Do you have anything you wish to say at this time?

Mr. Essin: Well, your Honor, while the record does not show it, this man is sixty-six years of age now. He is on Social Security pension. He is too old to work.

He has always desired to return to Finland, and if this Court sees fit to suspend sentence and sees fit to give him the opportunity to get the necessary travel documents—and he can start on them at once, that is, start proceedings at once to get travel documents to enter Finland, at least within a reasonable time, 90 or 120 days, depending upon how long Finland would require to get its machinery in motion to submit such papers and present such papers to him—if the sentence is suspended for any such appropriate time to get the papers, he will make every effort to, and he is reasonably sure that he can secure such papers.

While it isn't a matter of record in this case, I believe the Court is aware that for some time past, long after—well, not long after, I am not sure of the time element
343 there, but after the indictment was handed up the defendant did secure travel documents to go to Finland, but because of the pending trial, of course, and being under bond, he remained here for the trial. Because of his success in getting the papers last time, he feels reasonably sure that, if the sentence is suspended and if he is given time to get such documents, he will be able to secure them and depart from this country.

The Court: Well, at one time this defendant had offered to him—this Court offered this defendant after he was indicted the opportunity to leave the country. He was then a citizen of Canada, and he could have gone to Canada at that time. But he refused that permission of the Court; and he just insisted upon staying.

He has been in this country for all these years; he never became a citizen. While he was in this country he left, according to the record in this case, according to the deportation proceedings, he went back to Russia, he was over there for about three years, learning all he could about Communism; and then he came back here as one of
344 He left the country, and he came back and came in and went out without passports.

He is the editor of a paper. He is an intelligent man. He knew what he was doing. And he has been sheltered and protected by the laws of this country. The Government has thrown around him the cloak of protection of every law, and he has invoked his rights under the law—every right of a naturalized citizen, or any decent citizen. The Government gives the communist that right. And they gave them to him.

He admittedly was a communist. And the Government gives him every right. He had the right of deportation proceedings. He had every right that any citizen would have—rights that he wouldn't have gotten in Russia, that an American citizen wouldn't have gotten in Russia.

No, I feel that he has simply defied the law—he has set himself up above the law. He just made up his mind that he was a little higher than the law of this country, and that he didn't have to obey it. Well, he is going to obey the law.

345 It is the judgment of the Court that this defendant be sentenced to the custody of the Attorney General on Count One for a period of five years.

It is the further judgment of the Court that, on Count Two, the imposition of sentence be suspended until the termination of his sentence on Count One; and then, if he makes an application and makes an honest effort to leave this country and to comply with that order of deportation, then the Court will determine what it will do on Count Two of this indictment.

Mr. Essin: Now, if the Court please, is the Court setting any time limit after the first five years?

The Court: What is that?

Mr. Essin: I say, your Honor, is the Court setting any period of time after the first, the service of the sentence on the first Count, within which he can make application?

The Court: After he has completed the termination of the sentence on Count One, but at any time during that time he can make his application; but he will serve the sentence on Count One, and then I am suspending
346 the imposition of sentence on Count Two until I determine whether or not he has made an honest application and an effort to leave this country and to comply with that order.

Mr. Essin: Your Honor, it is in reference to that last statement you made. Is the Court setting any period of time after the service of the first sentence in which he has to get out?

The Court: Oh, I think within 60 days.

Mr. Essin: If the Court could make it 90, because he doesn't know how long it takes from the other end—that is, the country to which he would want to go, in which he can make the necessary effort to get papers.

The Court: Well, if he has made any effort he would know by this time how long—if he had made any effort to find out.

Mr. Rapp: May I suggest—

Mr. Essin: Your Honor, in the last proceedings—strike that. The last time he made an application to Finland and did secure travel documents, it was well in excess of 60 days from the time he first made application, until he actually got the document in his possession so he could travel; and that is the reason why I ask that the time element be not too short.

The Court: Well, I will fix that, that if within the last six months of the term imposed in the sentence of Count One, which is the five years—within that last six months if he makes application to deport himself from this country, then the Court will determine what it will do on Count Two. If he gets out of the country, most likely I will dismiss it. I will put him on probation, possibly, until he has an opportunity to get out of the country.

Mr. Essin: Now, your Honor, I would like to make several motions in connection with this matter, if I may at this time.

The Court: You may. The jury will be excused until ten o'clock tomorrow morning.

The Government doesn't owe this man anything—not a thing—or any of his kind.

Mr. Essin: I would like to move at this time, your Honor, for a stay of sentence pending appeal.

While the hour is relatively late, I can stay over until tomorrow morning, and draw up my notice of appeal and file it in this court the first thing tomorrow morning, after I have talked it up.

348 The Court: What was the bail bond here?

Mr. Essin: The bond—let me, if I may, explain that the bond was increased originally from \$3,000 after conviction on the first trial, it was increased to \$5,000. I ask that the same bail be kept in effect pending appeal this time, since the original bail prior to conviction on the first trial was \$3,000. And then this Court increased it to five after conviction, after the first trial. So that it is

now \$5,000, and I am asking that the same bail of \$5,000 be continued.

The Court: Mr. Rapp?

Mr. Rapp: Yes, sir.

The Court: Has the Government any objection to this man being released on bond pending his application, or his determination to appeal?

Mr. Rapp: I only have this comment to make, your Honor: That these proceedings have been pending against him now since 1949. They originated at that time. I presume that we can keep on continuing appeals and trials and appeals, ad infinitum.

The Court: It is a fine illustration of how long a Communist can delay his deportation, by using all the Constitutional rights and the protections that the law gives to him.

349 Mr. Rapp: I would think after two trials, your Honor, that he ought to be willing to start serving his sentence immediately, to get that part of it over with so he can leave for his own country.

Mr. Essin: May I answer that, your Honor?

This Court said, I believe, in the instructions, and in other parts of the trial, that this man, regardless of whether he is a Communist or not, is entitled to the same protection of the law as anyone.

The Court: Of course he is, and he has had it. If any man has ever had the protection of our laws and our Government, he has.

Mr. Essin: I have advised him that he has a good basis of appeal. And let me read to the Court from the Court of Appeals' decision at the time this matter was reviewed—

The Court: I know all about that—you don't have to read me a thing.

I will say right now: Let the Marshal take this man into custody until you furnish a bond of \$7,000.

Mr. Essin: Your Honor, \$5,000 has been posted. Let me indicate, your Honor, that the bail was \$3,000 prior 350 to the trial, the first trial. After the conviction it was increased to five by this Court, and the additional \$2,000 was posted. Now, after the reversal, if this man would have had the money to pay my expenses—

The Court: If and when you file your appeal and the Court is satisfied that you are making an appeal, an honest attempt to make an appeal—

Mr. Essin: Your Honor, if the time were a little earlier if it weren't so close to five o'clock and I don't want to detain the Clerk's office, we could prepare it and file it today. I will file it the first thing tomorrow morning.

The Court: You were complaining around here to somebody that this man had no funds with which to defend himself, and you weren't being paid, and so forth.

Mr. Essin: And I haven't been paid.

The Court: Who is financing this?

Mr. Essin: I came here, your Honor, at my own expense, and I have not been paid.

The Court: Who is going to finance the costs of his appeal?

Mr. Essin: His friends have raised some money 351 to pay certain costs of the appeal. I did not receive any fee—they paid for the cost of printing and preparing of the record. And that cost they will raise. And I myself am perfectly willing to state on the record here, your Honor—

The Court: He will be taken into the custody of the Marshal, and remain there until you file your appeal papers, and file a bond of \$5,000.

Mr. Essin: In other words, the bond is to be the same, is that it?

The Court: Yes, I will fix the bond.

Mr. Essin: I would like to state to the Court on the record, when the Clerk's office—if it closes at five o'clock, I assume?

Mr. Rapp: Four thirty.

Mr. Essin: Four thirty? Well, the first thing tomorrow morning, at the opening of court, I will have the notice of appeal in. I understand, then, that he is released on the same bail, of \$5,000.

The Court: He will be, yes, if you have filed your appeal papers.

Mr. Essin: My appeal will be filed tomorrow morning at nine o'clock.

The Court: Yes. In the meantime, he will be taken 352 into the custody of the Marshal.

You may take him into custody. The Court will be in recess.

(At 4:55 o'clock in the afternoon, an adjournment was taken until Wednesday, the 11th day of January, 1956.)

(The above and foregoing were all of the proceedings had in the trial of the said cause.)

354

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—13,367) * *

VERDICT.

(Filed Jan. 10, 1956. Edgar M. Alstad, Clerk.)

We, the jury, for our verdict in the above-entitled action, find the defendant, Knut Einar Heikkinen;

As to Count One: Guilty.

As to Count Two: Guilty.

Eugene F. Stuessy,
Foreman.

Dated at Madison, Wisconsin, this 10th day of January, 1956

355 IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA.

* * (Caption—13,367) * *

JUDGMENT AND COMMITMENT.

(Filed Jan. 10, 1956. Edgar M. Alstad, Clerk.)

It appearing to the satisfaction of the Court that the above-named defendant, Knut Einar Heikkinen, was indicted by a Grand Jury for the United States District Court for the Western District of Wisconsin, on the 10th day of November, 1953; that thereafter on February 9, 1953, said defendant appeared in court, with counsel, waived the reading of the indictment and entered a plea of not guilty; that thereafter, and on the 10th day of January, 1956, said defendant was lawfully convicted by a jury of Count One of said indictment which reads as follows:

* * Count One

"1. Defendant, Knut Einar Heikkinen, is an alien who entered the United States at Eastport, Idaho on or about October 1, 1916, from Canada, and against whom an Order of Deportation is outstanding under the provisions of 8 U. S. C. 137, said Order having been entered on or about April 9, 1952 by reason of the said Knut Einar Heikkinen

having been found in the United States in violation of said Act of Congress in that the said Knut Einar Heikkinen was, after entry, a member of the following class as set forth in Section 1 of the Act of October 16, 1918, as amended (64 Stat. 1006), to-wit, a member of the Communist Party of the United States, and, pursuant to said Order of Deportation, was required to depart from the United States during the period of six months from April 9, 1952.

"2. During the period of six months from April 9, 1952, and continuously thereafter, the defendant, Knut Einar Heikkinen, did willfully fail to depart from the United States and during said period and thereafter remained in Superior, Douglas County, within the Western District of Wisconsin."

And, Count Two of said indictment which reads as follows:

"Count Two

"1. The grand jury realleges all of the allegations of paragraph 1 of Count One of the indictment the same as if the allegations were fully set forth herein.

356. "2. During the period of six months from April 9, 1952 and continuously thereafter, the defendant Knut Einar Heikkinen, while in the Western District of Wisconsin, did willfully fail to make timely application in good faith for travel or other documents necessary to his departure from the United States."

Therefore, It Is Adjudged that the defendant is guilty as charged on both counts of said indictment, and the court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

Therefore, It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on Count One of said indictment.

It Is Further Adjudged that the imposition of sentence on Count Two of said indictment is suspended until the completion of the service of the sentence imposed on the defendant on Count One of said indictment, or until he is otherwise discharged from imprisonment, pursuant to the judgment entered herein on Count One.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

It Is Further Ordered that the defendant shall remain in the custody of the United States Marshal for the Western District of Wisconsin until notice of appeal from the judgment of this Court has been filed with the Clerk of this Court, and until the defendant has filed a good and sufficient bond to be approved by the Court in the sum of Five Thousand Dollars (\$5,000.00).

Patrick T. Stone,
United States District Judge.

The Court recommends commitment to: No recommendation.

Edgar M. Alstad,
Clerk.

357² IN THE DISTRICT COURT OF THE UNITED STATES

For the Western District of Wisconsin.

United States of America, }
 vs. } No. 13,367.
Knut Einar Heikkinen. }

NOTICE OF APPEAL.

(Filed 1/11/56. Edgar M. Alstad, Clerk.)

The defendant is Knut Einar Heikkinen.

The defendant resides at 603 Tower Avenue, Superior, Wisconsin. Counsel for defendant, who resides in Milwaukee, Wisconsin, has his offices at: 623 N. 2nd Street, Milwaukee, Wisconsin. Counsel for defendant is: M. Michael Essin.

The defendant has been found guilty on count number one of wilfully failing to depart from the United States during the period of six months after the entry of an Order of Deportation, and on count number two of wilfully failing to make timely application, during the period of six months after the Order of Deportation was entered and continuously thereafter, in good faith for travel or other documents necessary to his departure from the United States.

The Judgment of the Court was entered on the 10th day of January, 1956, and found the defendant guilty of both counts in the indictment. The Judgment further provided for imprisonment for a period of five years on the first count; and sentence on the second count was suspended until the Court could determine what efforts the defendant had made to effect his departure upon completion of his sentence on the first count.

The place of confinement of the defendant is the County Jail at Madison, Dane County, Wisconsin. The defendant has furnished \$5,000.00 as bail. He may be released upon the filing of this Notice of Appeal.

The defendant appeals from this Judgment.

Dated this 11th day of January, 1956.

Knut Einar Heikkinen,

By his attorney

M. Michael Essin.

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IN THE UNITED STATES DISTRICT COURT.

(Caption—13367)

STATEMENT OF POINTS ON APPEAL

(Filed 3/14/56. Edgar M. Alstad, Clerk.)

The points upon which defendant-appellant will rely on appeal are:

1. The Court erred in denying the motion to dismiss the indictment.

2. The Court erred in denying in part defendant-appellant's motion for pre-trial discovery of documents under Rule 17 (a) as follows:

“3. All correspondence and records of telephone conversations by officers, employees, and agents of the United States Immigration and Naturalization Service, Department of Justice, or by any representative of the Government of the United States of America with any representatives of any foreign countries relating to the defendant herein and all replies or other communications including records of the telephone conversations received by said officers, employees, and agents of the United States Immigration and Naturalization Service, Department of Justice, or by any representative of the Government of the United

States of America from any representative of foreign countries relating to the defendant herein.

"4. All documents, books and papers obtained by Government Counsel in any manner other than by seizure or process: (a) in the course of investigation by the Grand Jury, which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for trial in this case, if such books, papers and documents have been presented to the Grand Jury or are to be offered as evidence on the trial in this case; if such books, papers and documents have been presented to the Grand Jury 360 or are to be offered as evidence on the trial under said Indictment, except those of the above which were offered by the government on the prior trial in this cause."

3. The Court erred in denying in part defendant-appellant's motion, dated November 29, 1955, for review and order holding that no valid order of deportation was entered, and in denying the motion for dismissal of the indictment.

4. The Court erred in overruling objection to the admission in evidence on the trial and in admitting in evidence and in having read to the jury the decision or disposition of the Hearing Officer (Exhibit No. 3).

5. The Court erred in overruling objections to the admission in evidence, and in admitting in evidence the Order of Deportation of the Assistant Commissioner, Adjudications Division, entered October 8, 1951 (Exhibit No. 4).

6. The Court erred in finding:

(a) That the defendant was accorded due process before the Immigration and Naturalization Service.

(b) That the order of deportation was valid.

(c) That the defendant was not deprived of counsel before the Immigration and Naturalization Service.

(d) That the order of deportation was supported by reasonable, substantial and probative evidence.

(e) That the pertinent statutory provisions were duly followed by the Immigration and Naturalization Service.

7. The Court erred in overruling objections to the admission in evidence, and in admitting in evidence, the order or findings of the Appeal Board dismissing the appeal from the order of deportation (Exhibit No. 5).

8. The Court erred in overruling objections to the admission in evidence, and in admitting in evidence the letter from the Immigration and Naturalization Service to the defendant dated April 30, 1952 (Exhibit No. 6).

9. The Court erred in overruling objections to the admission in evidence, and in admitting in evidence, the 361 United States postal return receipt card (Exhibit No. 7).

10. The Court erred in overruling defendant's objection to argument by counsel for the plaintiff on the law before the jury as follows:

"The Court: What is your answer to that? Did he fail, did he refuse to present himself for deportation?"

"The Witness: He did not."

"Mr. Rapp: Please the Court, I would like to interpose objection to this question because it presupposes that the Attorney-General had designated a place his—for him to appear for deportation. And that is not the fact. There has been no testimony with reference to that fact. The Attorney-General did not at any time designate a place for him to appear to be deported."

"The duty devolves on the citizen himself—or the alien himself, to depart, and to procure necessary travel documents—not the Immigration and Naturalization Service, not the Attorney-General of the United States, or any other officer of the government."

"Mr. Essin: Your Honor, I object to the argument on the law at this point."

"The Court: He has made his statement. Let me ask this witness a question."

11. The Court erred in denying defendant's motion to strike testimony as follows:

"The Court: He has made a statement. Let me ask this witness a question:

"Have you any knowledge as to whether or not he failed to depart from this country within the six months?"

"The Witness: Yes, I have."

"The Court: Did he depart, or did he not?"

"The Witness: He did not."

"The Court: Did you know that of your own knowledge?"

"The Witness: Yes, I know that of my own knowledge. He could have departed. But he didn't."

"Mr. Essin: Your Honor, I move that the last statement be stricken as not being responsive, and completely uncalled for by the question asked by the Court."

362 "The Court: Objection overruled."

12. The Court erred in overruling objections to the

admission in evidence, and in admitting evidence, a written statement purportedly signed by the defendant, dated February 12, 1953 (Exhibit No. 8).

13. The Court erred in sustaining objections to the questions of defense counsel in cross-examination, as follows:

"Q. And Mr. Heikkinen, to your knowledge, was never reprimanded or called to task by the Immigration Service for failure to write in twice a month as he was required to do?

"Mr. Rapp: If it please the Court, I object to that question. It relates to supervision.

"The Court: Objection sustained.

"Mr. Essin: Well, your Honor, the question of supervised parole was brought up on direct examination.

"The Court: Objection sustained. I have already ruled on that."

14. The Court erred in sustaining objections to the questions of defense counsel in cross-examination, and in denying defendant's motion to extract from Exhibit 1 for purposes of impeachment a certain warrant of deportation as follows:

"Q. Now, Mr. Boldin, the warrant of deportation of alien, dated April 25, 1952, which you claimed you showed served on Mr. Heikkinen on February 12, 1953, had never been served on Mr. Heikkinen. Isn't that true?

"A. That is not true.

"Mr. Essin: All right. Mr. Rapp—

"The Court: What was your answer?

"The Witness: I said that is not true.

(The following proceedings were had between the Court and counsel at the bench, out of the hearing of the jury:)

"Mr. Essin: Exhibit No. 1 contains the order, that is, the warrant of deportation of alien, which shows no
363 return as to service upon Mr. Heikkinen. I would like to have that extracted from the record; to impeach the testimony of this witness.

"Mr. Rapp: I object to that.

(The following further proceedings were had in the presence and hearing of the jury:)

"The Court: Will you read to the witness the question, and then also read his answer?

(Former record read by the reporter, as follows:)

"Question: Now, Mr. Boldin, the warrant of deporta-

tion of alien, dated April 25, 1952, which you claimed you showed Mr. Heikkinen on February 12, 1953, had never been served on Mr. Heikkinen. Isn't that true?

"Answer: That is not true.

"The Court: Do you know whether it is true or not, of your own knowledge?

"The Witness: I know that. It is not true.

"The Court: Why do you know that?

"The Witness: Because in the sworn statement here, I can point out—

"The Court: What is that?

"The Witness: In this sworn statement that I took from him—

"The Court: Yes?

"The Witness: (Continuing.) —I do call the attention of Mr. Heikkinen that two letters were served on him on April 30, 1952, one by Registered mail, Registered Article No. 32114, one of which was the Form I-229 letter dated April 30th, 1952. May I refer to this, before I proceed?

"The Court: Yes, yes.

(Witness examines exhibit 8.)

364 "The Court: If there is any part of those missing pages that will be helpful to you, you may look at those, too. Where are those missing pages?

"The Witness: Yes, here it is— Right here it is (indicating). On page 2, the second question, I believe, covers what I am endeavoring to testify to. The question, directed to Mr. Heikkinen:

"Our Duluth file A4316699 T contains copy of a letter addressed to Mr. Knut Einar Heikkinen, 603 Tower Avenue, Superior, Wisconsin, by Harry Gordon, Officer in charge of the Immigration and Naturalization Service at Duluth, Minnesota, dated April 30, 1952, being a notification that a warrant directing his deportation to Finland had been issued on April 25, 1952, by Marcus T. Neelly, District Director, Chicago District, quoting the charges under which he was ordered deported and enclosing a copy of the Warrant of Deportation.' That is what I am testifying to. A second letter—

"Mr. Essin: Q. Now, Mr. Boldin, you testified that the Exhibit No. 5, dated April 9, 1952, is the order of deportation. Right?

(Witness examines exhibits.)

"The Court: Is that Exhibit 5?

"The Witness: Exhibit 5. He said Exhibit 6.

"The Court: This is Exhibit 5.

"Mr. Essin: No, I didn't say Exhibit 6. I said Exhibit 5."

"The Court: If somebody would move around here once in a while and pass these exhibits back and forth—(Examining-exhibits). Now, this isn't—this isn't the order. This is the order that the appeal be dismissed.

"Mr. Essin: Your Honor, that is the final order entered in this matter."

"The Court: Get your exhibits straightened out. Where is the order of deportation? What number is that? This is the appeal from that order.

"Mr. Essin: Yes, your Honor.

"Mr. Rapp: Exhibit No. 4 (indicating).

"Mr. Essin: That (indicating) is the final order dismissing the appeal. That is the final order entered in this matter."

365 "The Court: What do you want? Ask your question. Let's move along.

"Mr. Essin: I have asked the question, your Honor.

"The Court: Read the question.

(Last question read by reporter, as follows:)

"Question: Now, Mr. Boldin, you testified that the Exhibit No. 5, dated April 9, 1952, is the order of deportation. Right?"

"Mr. Essin: Q. And that no order of deportation was ever entered deporting, or ordering Mr. Heikkinen's deportation to Finland. Isn't that right?"

"The Witness: A. As to that, I do not know. I have no knowledge.

"Q. You don't know?"

"A. I have knowledge of the fact that Mr. Heikkinen's deportation to Finland was directed in the order of deportation which I have described on the second question of page 2 of Exhibit 8.

"The Court: Did you ever see any order of deportation which directed his deportation to Finland? Or are you just surmising that now?"

"The Witness: I didn't see any order of deportation.

"The Court: You didn't see any?"

"The Witness: I saw a warrant of deportation, directing his deportation, which I showed to Mr. Heikkinen.

"The Court: And it directed his deportation to where?"

"The Witness: To Finland. Continuing—

"Mr. Essin: Now—I am sorry. Go ahead.

"The Witness: I wanted to complete my previous answering. This warrant of deportation that I have described is further covered by this statement in my question to Mr. Heikkinen:

"Mr. Essin: Q. What page are you referring to?

"The Witness: (Reading from Exhibit 8): "It was mailed to you as Registered Article No. 32114, and the copy bears further endorsement that a copy was also mailed to your attorney, Isadore Englander, Esquire, 205 E. 366 42 St., New York 17, N. Y., for his information. Did you receive the original of that letter by Registered mail, copy of which I now show you? (Inspected by alien).

"Answer: Yes, I did," is the answer.

"Q. All right. Mr. Boldin, you have testified that there was no order—am I correct in stating that you have testified that there was no order of deportation entered at any time which ordered Heikkinen's deportation to Finland?

"A. I don't—

"Q. Now, we are talking about orders entered, court orders.

"The Court: He said that. He said that was a warrant. There is no order, but there was a warrant. He has already testified to that.

"Mr. Essin: All right.

"Q. Now, the warrant of deportation was not issued by anybody of the Immigration Service as the result of a hearing, was it?

"The Witness: A. Yes, it was.

"Q. I am talking about a hearing.

"A. A deportation hearing, yes. Following the completion of a deportation hearing, a warrant of deportation was issued.

"Q. After the order was entered, is that right?

"A. Yes.

"Q. But the warrant itself was not issued by a Hearing Officer or by a Appeals Board, was it?

"A. They are not issued by such officers.

"Q. Oh, they are not?

"A. No.

"Q. Now, have you been in court here all day today?

"A. Yes.

"Q. Mr Boldin—you have?

367 "A. Yes.

"Q. And during the time when the proceedings were going on, you were in court, is that right?

"A. Yes.

"Q. Now, at no time when you were in court was any warrant of deportation submitted in evidence, as far as you know, was it?

"Mr. Rapp: Please the Court, I object to that question. The record speaks for itself.

"The Court: There is an order of deportation in this record.

"Mr. Essin: No, we are talking about a warrant of deportation, your Honor, which is an entirely different document.

"Mr. Rapp: There is a warrant of deportation in the Exhibits 1 and 2—as a matter of fact, there are two of them in there.

"Mr. Essin: Your Honor, I would like to renew my motion—

"The Court: Well, he was sitting here in the courtroom. He wasn't pawing through these exhibits.

"Mr. Essin: I am asking him what he heard, your Honor.

"The Court: What is that?

"Mr. Essin: I am asking him what he heard. I am asking him what he heard. He was here all day.

"The Court: He didn't hear any more than the jury heard.

"Mr. Essin: Well, that's all I am asking him. Your Honor, I would like to renew my motion to have extracted from Exhibit No. 1 the warrant of deportation, to offer it in evidence here to show that no return of service is indicated, on the warrant of deportation.

"The Court: The Court will look into that during the recess. I will reserve my ruling on that.

"Mr. Rapp: May I just state for the record that Exhibits 1 and 2 are already in evidence, and if one portion of it is going to be removed, I suggest that all of it be removed, and be made available to the jury, and not take it piece meal.

"The Court: Is there a warrant in there, for his deportation to Finland? Let me see it.

(Mr. Rapp examines exhibits.)

368 "Mr. Rapp: There are two warrants. This (indicating) is the second warrant which was issued, and the first one is here—to Finland.

"Mr. Essin: And neither one of them shows service made upon the defendant.

"The Court: What is that? Well, there are other ways of proving service. It doesn't have to appear upon the warrant.

"Mr. Rapp: No. Furthermore, it does not have to be served upon the defendant. Only the order has to be served upon the defendant.

"The Court: His order of deportation.

"Mr. Rapp: And that was done.

"Mr. Essin: Well, if the Government is willing to concede that a warrant of deportation need not be served upon the defendant—

"Mr. Rapp: We are not conceding anything, your Honor.

"Mr. Essin: All right.

"Mr. Rapp: But there is proof that this warrant of deportation was sent by Registered mail by Mr. Gordon, which Mr. Gordon testified, and which this (indicating) is a return receipt of. That was included in that.

"The Court: Well, a copy of this warrant of deportation was in the letter?

"Mr. Rapp: That is correct.

"The Court: The letter, the communication sent by Gordon?

"Mr. Rapp: That is correct. And in this statement, marked Exhibit 8 (indicating), Mr. Heikkinen admits receipt, not only of the letter with the form in it, but also of this warrant of deportation.

"The Court: Well, that's sufficient, then.

"Mr. Essin: May I see that exhibit again, please? No, not this exhibit—

"The Court: You have seen it.

"Mr. Essin: No, I don't mean this exhibit—no, the other one (indicating). I don't mean this one.

"The Court: Well, Heikkinen did admit to you that he did receive a copy of the warrant of deportation?

369 "The Witness: The letter with the copy.

"The Court: In that letter, and that was in the Registered letter on which he signed the receipt, in which the receipt is marked Exhibit 7?

"The Witness: Your Honor, Registered Article 32114—

"The Court: And Heikkinen admitted he had received that warrant of deportation?

"The Witness: The letter and the warrant—

"The Court: What is that? The letter and the warrant?

"The Witness: The transmittal letter and the warrant.

"The Court: That is sufficient.

"Mr. Essin: If the Court please, it seems there are a couple of exhibits—there is one in here some place (examining exhibits)—

"Mr. Rapp: If it please the Court, I have one further observation on that:

Under the law it is not required that the warrant of deportation must be served on the defendant, in these proceedings. The warrant is directed to the officer in charge of Immigration and Naturalization office, or any one of his subordinates.

"The Court: Make that statement for the record. Make that statement again, Mr. Rapp.

"Mr. Rapp: If it please the Court, under the laws of the United States it does not appear that a warrant of deportation need be served upon the defendant. The warrant itself is directed—the warrant of deportation of alien is directed, not to a particular defendant, but to an officer in charge of an Immigration and Naturalization Service of a particular area, or any of his employees or subordinates. And it authorizes them to take the man into custody or—

"The Court: Let me see that once more, will you, please? (Examining exhibit.)

"Mr. Rapp: However, in this case, your Honor, the warrant was served on him. It is directed to the officer in charge.

"The Court: Let the record show that the warrant of deportation dated the 25th day of April, 1952, No. A4316699 T is directed to:

370 "Officer in Charge, Immigration and Naturalization Service, Duluth, Minnesota, or to any officer or employee of the United States Immigration and Naturalization Service:

"Whereas, after due hearing before an authorized Hearing Officer and upon the basis thereof, an order has been duly made that the alien, Knut Einar Heikkinen, who entered the United States at an unknown place in or about

1933 is subject to deportation under the following provisions of the laws of the United States to-wit:

"The Immigration Act of May 26, 1924, in that, at the time of entry he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder; and

"The Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.

"I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, do hereby command you to deport the said alien to Finland, at the expense of the appropriation Salaries and Expenses, Immigration and Naturalization Service, 1952.

"For so doing this shall be your sufficient warrant. This is directed to the Officer in charge, who was in charge at that time,—whoever was in charge at that time—Harry Gordon, I think was in charge at that time.

"For so doing this shall be your sufficient warrant.

"Witness my hand and seal this 25th day of April, 1952."

"Mr. Essin: Your Honor—

"The Court: He knew about that, so what is all this discussion?

"Mr. Essin: Your Honor, my contention is that the document was never served upon the defendant.

"The Court: He has testified he received a copy of that by Registered mail. That is his testimony.

"Mr. Essin: Your Honor, here is Exhibit No. 6, the very document which Mr. Boldin claims—

"The Court: He didn't have to have a copy of that warrant. That was directed to this officer to take this in charge and see that he was deported.

"Mr. Essin: All right, then. Mr. Boldin claims that that warrant is an order of deportation, which it is not.

"The Court: Oh, we know it is just a question of interpretation.

"Mr. Rapp: It is a question of terminology, your Honor.

371 "The Court: Yes. We are not going to discuss that any more. We are wasting time here over trivialities.

"Mr. Essin: Q. Now, Mr. Boldin,—

"The Court: The defendant didn't have to have a copy of that warrant. He had a copy of the order of deportation, and then it was his duty to deport himself.

Proceed.

"Mr. Essin: Your Honor—

"The Court: Go ahead.

"Mr. Essin: I would like to point out here that again, on page 4—

"The Court: He didn't have to have a copy of this warrant.

"Mr. Essin: I would like to examine Mr. Boldin in reference to the very same issue on another page of the statement of Mr. Heikkinen, where again he asks the same question about an order of deportation in February—April 25th—

"The Court: Well, the fact is that the order of deportation was dated April 9th, 1952, and the warrant was dated February—whatever it was—or April—what was the date of that warrant?

"Mr. Essin: April 25th.

"Mr. Rapp: April 25th is the first warrant.

"Mr. Essin: Yes.

"The Court: One directed to the defendant, and the other directed to the officer in charge.

"Mr. Essin: Right. Your Honor, this is our contention—

"The Court: Let's waste no more time about that.

Proceed.

"Mr. Essin: All right."

15. The Court erred in sustaining objections to questions of the defense counsel in cross-examination, as follows:

"Q. Mr. Boldin, on any occasion, or on all the occasions that you saw Mr. Heikkinen and interviewed him, did he refuse to go to any country designated by the Immigration Service?

372 "Mr. Rapp: I object to that question, your Honor.

In the first place, it presumes that the Immigration Service had directed a country; and that is not in evidence in this particular case.

"The Court: Objection sustained."

16. The Court erred in overruling objections of defense counsel to the question of plaintiff's counsel in direct examination, as follows:

"Q. State whether or not the mere fact that your Service has this information necessarily means that they will follow through and obtain or attempt to obtain travel documents?"

"The Witness: A. Yes.

"Mr. Essin: Hold that answer, please. I object to that as calling for a conclusion.

"The Court: Overruled. He may answer. * * * Answer: No, it doesn't necessarily mean so."

17. The Court erred in overruling defendant's objection to the question of plaintiff's counsel in direct examination, as follows:

"Q. Let me ask you this question:

Is it at all necessary for an alien to obtain certain documents from this country to leave?

"Mr. Essin: I object to that as calling for a conclusion.

"The Court: Overruled. You may answer.

"The Witness: A. I don't believe exit requirements exist. They didn't then. They sometimes do in war time. I know.

"Mr. Rapp: Q. But at this time they didn't?

"A. No."

18. The Court erred in overruling defendant's objection to the Court's question, as follows:

"The Court: After the defendant obtained a copy of the order of deportation, which directed him to leave the country within six months, what steps should he—would he be required to take in order to leave the country?"

"The Witness: Following the instruction—

373. "Mr. Essin: If the Court please—If your Honor please, I will object to that question as calling for a legal conclusion.

"The Court: Your objection is overruled * * *"

19. The Court erred in sustaining objections to the question of defense counsel in cross-examination, as follows:

"Q. Now, with reference to Mr. Heikkinen, from your own knowledge and experience as Immigrant Officer, or with any other alien facing deportation, it is true, is it not, that no alien is permitted to leave the country unless there are travel documents in existence for him to go to a specified country?"

"Mr. Rapp: Please the Court, I object to that, because it isn't pertaining to this particular case.

"The Court: Objection sustained."

20. The Court erred in overruling and denying defendant's renewed motion for dismissal of the indictment and the motion for judgment of acquittal.

21. The Court erred in refusing to give to the jury the following proposed instructions:

"7. The mere presence in this country of an alien is not evidence of guilt.

"15. The statute makes it a crime for an alien who deliberately refuses to leave this country and there is another country which will lawfully admit him. This law does not apply to an alien when there is no country which will unlawfully admit him."

"16. Under this law the only duties which rest with the alien are:

"(a) Not to conceal his whereabouts after a final order of deportation has been made, and

"(b) To present himself for deportation when asked to do so by the Attorney General of the United States."

"17. An alien is entitled to rely on counsel and to have counsel represent him at every stage of the deportation proceeding which may result in his eventual deportation. He is entitled to be advised of his right to counsel in any proceeding, formal or informal, which may result in a criminal prosecution of that alien."

22. The Court erred in ruling that Exhibits No. 3, 4 and 5, will not be read or sent, to the jury room.

374 23. The Court erred in instructing the jury that:

"* * * I have found that the defendant was accorded due process, and that the deportation order is valid and effective for all purposes.

He was granted a reasonable period of time after his arrest within which to arrange for the presentation of his case, including representation by counsel. He was given reasonable notice of the nature of the charges against him, to-wit: That at the time of entry he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder; and that the Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.

He was given reasonable notice of the time and place at which the proceedings would be held, and was informed

of his privilege of being represented by counsel. He had a right to be represented by counsel; and he was so informed. He had a reasonable opportunity to cross examine the witness, and to examine the evidence against him. He had a right of appeal * * *

* * * I have found judicially that the order of deportation is based upon reasonable, substantial, and probative evidence, and is valid."

"Reference has been made by the defendant's counsel to the warrant for deportation of alien, dated April 25, 1952. I say to you that this is a warrant directed, not to the defendant, but to the Officer in charge of the Immigration and Naturalization Service, Duluth, Minnesota; and that the law does not require that this warrant of authority directed to that officer be served upon the defendant, before the defendant takes the necessary steps to depart from this country, or to make timely application in good faith for travel or other documents necessary to his departure from the United States; and it is not an issue in this case * * *

"You are instructed that the statute on which this indictment is laid, to-wit, Section 156 (c), Title 8, United States Code, the material parts of which I have read to you, places upon an alien against whom an order of deportation is outstanding, an affirmative duty and an obligation on his part to take specific steps toward effecting his own departure from the United States, and to that end to make timely application for travel or other documents necessary to such departure * * *

"There is no duty on the part of the Government to assist the defendant in effecting his departure. The Government will, if requested, assist him. But the duty devolves upon the defendant to comply with that order of deportation.

375 As I say, the material parts of the statute I have read to you place upon an alien against whom an order of deportation is outstanding, an affirmative duty or obligation on his part to take specific steps toward effecting his own departure from the United States. In other words, he can't remain idle. He must take the necessary steps to effect his departure from this country within that period of six months. And if he fails to do so, he has violated the law and the statute involved in this case."

24. The Court erred in refusing to grant a new trial.
25. The Court erred in denying the motion in arrest of judgment.

M. Michael Essin,
Attorney for defendant-appellant
840 Madison Building
623 North 2nd Street,
Milwaukee 3, Wisconsin.

Dated this 13th day of March, 1956.

I herewith certify that on the 13th day of March, 1956, I served a copy of the foregoing statement of points on appeal upon George E. Rapp, Esq., Counsel for plaintiff-appellee, by depositing in the United States mail by certified mail addressed to his office in the United States Post Office Building, Madison, Wisconsin, a copy of said statement of points on appeal.

M. Michael Essin,
Attorney for defendant-appellant.

Endorsed: In the United States District Court * *
(Caption—13,367) * * Statement of Points on Appeal.

376 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—13,367) * *

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL.

(Filed 3/14/56. Edgar M. Alstad, Clerk.)

To the Clerk of Court:

Pursuant to Rule 39 (b) of the Federal Rules of Criminal Procedure and by reference therein, pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the defendant-appellant hereby designates for inclusion in the record on appeal to the United States Court of Appeal for the Seventh Circuit, taken by notice of appeal filed January 11, 1956, the following portions of the record, proceedings and evidence in this action:

1. The indictment dated November 10, 1953 (Document No. 12).

2. Defendant's motion, dated October 28, 1955, to dismiss the indictment (Document No. 38).

3. Defendant's motion, dated October 28, 1955, for pre-trial discovery of documents under Rule 17 (a) of the Federal Rules of Criminal Procedure (Document No. 39).

4. Subpoena Duces Tecum, dated October 28, 1955, to George E. Rapp, Esq., U. S. Attorney for Western District of Wisconsin (Document No. 40).

5. Official Court Reporter's Stenographic Transcript of proceedings, including the rulings and decisions of the Court on items 2, 3, and 4, above, on November 8, 1955, and certified by the Official Court Reporter on January 18, 1956.

6. Defendant's motions, dated November 29, 1955, for review and order holding that no valid deportation order was entered; and for dismissal of indictment (Document No. 42).

7. Official Court Reporter's Stenographic Transcript of the proceedings, including rulings and decisions of the Court on December 1, 1955.

8. Official Court Reporter's Stenographic Transcript of the proceedings, including rulings and decisions of the Court on December 13, 1955.

9. Official Court Reporter's Stenographic Transcript of proceedings on and subsequent to the trial of the above entitled cause at Madison, Wisconsin, on January 9 and 10, 1956, including: preliminary motions of defendant, and Court's rulings thereon; testimony of all witnesses and copies of all exhibits offered in evidence; objections to evidence, if any, and the Court's rulings thereon; defendant's motion for judgment of acquittal at close of plaintiff's evidence and Court's rulings thereon; other motions of defendant, if any, and Court's rulings thereon; the Court's given instructions to the jury and the Court's rulings thereon; defendant's requested and refused instructions; the return of the verdict of the jury; defendant's motions after verdict and the Court's rulings thereon.

10. Verdict of Jury, dated January 10, 1956 (Document No. 46).

11. Judgment and commitment, dated January 10, 1956 (Document No. 47).

12. Notice of Appeal, dated January 11, 1956 (Document No. 48).

13. Recognizance dated January 24, 1956 (Document No. 50).

14. Order dated February 15, 1956, extending time to March 20, 1956, for filing record and docketing appeal. (Document No. 52).

15. Order certifying exhibits, dated February 20, 1956. (Document No. 54).

16. Statement of Points on appeal, dated March 13, 1956.

378 17. This designation, dated March 13, 1956.

18. Journal entries.

M. Michael Essin,

Attorney for defendant-appellant

840 Madison Building,

623 North 2nd Street,

Milwaukee 3, Wisconsin.

Dated this 13th day of March, 1956.

I herewith certify that on the 13th day of March, 1956, I served a copy of the foregoing designation upon George E. Rapp, Esq., Counsel for plaintiff-appellee, by depositing in the United States mail by certified mail addressed to his office in the United States Post Office Building, Madison, Wisconsin, a copy of said designation.

M. Michael Essin,

Attorney for defendant-appellant.

378½ Endorsed: In the United States District Court * *
(Caption—13,367) * * Designation of Contents of
Record on Appeal.

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IN THE UNITED STATES DISTRICT COURT.

* * (Caption—13,367) * *

RECOGNIZANCE.

(Filed Jan. 24, 1956. Edgar M. Alstad, Clerk.)

Know All Men By These Presents, that we, Knut Einar Heikkinen, as principal, and Victor Hiltunen, as surety, are held and firmly bound unto the United States of America in the full and just sum of Five Thousand Dollars (\$5,000.00), for the payment of which to the said United States of America well and truly to be made, we and each of us, do hereby bind ourselves, our successors, personal representatives, and assign, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of January, A. D. 1956.

Whereas, lately, at a session of the United States District Court for the Western District of Wisconsin, in a suit pending in said Court, at Madison, Wisconsin, between the United States of America, as plaintiff, and Knut Einar

Heikkinen, as defendant, a judgment was rendered
380 against said Knut Einar Heikkinen, defendant, on the

10th day of January, 1956, sentencing said Knut Einar Heikkinen to be imprisoned for a term of five years in the Federal Penitentiary, and that said defendant, Knut Einar Heikkinen, having filed a Notice of Appeal to the United States Court of Appeals, Seventh Circuit, in the Clerk's office of said Court, to reverse the Judgment in the afore-said suit; and whereas the said defendant, Knut Einar Heikkinen, desires to file this bond so that it will operate as a supersedeas and stay of execution and to be admitted to bail and to be permitted to be and remain at large on bail pending said proceedings on appeal to the United States Court of Appeals, Seventh Circuit:

Now, the Condition of the Above Obligation Is Such that if the said Knut Einar Heikkinen shall promptly prosecute his appeal, and if he fail to make his plea good, shall personally be and appear here in this Court from day to day during the present term thereof, and from term to term of this Court thereafter, pending said proceedings on appeal, and shall surrender himself to the United States

Marshal of this District and be present to abide the Judgment of this Court or of a final determination on appeal, and serve his sentence and not depart the jurisdiction of this Court without leave thereof, then this obligation to be void; otherwise to remain in full force and effect.

/s/ Knut Einar Heikkinen, (Seal)
603 Tower Ave.,
Superior, Wis.

381 Taken and acknowledged, before me at Madison, Wisconsin, this 24th day of January, A. D. 1956.

/s/ Edgar M. Alstad,
Clerk, United States District Court.

Now, the Condition of the Above Obligation Is Such that if the said Knut Einar Heikkinen shall promptly prosecute his appeal, and if he fail to make his plea good, shall personally be and appear here in this Court from day to day during the present term thereof, and from term to term of this Court thereafter, pending said proceedings on appeal, and shall surrender himself to the United States Marshal of this District and be present to abide the Judgment of this Court or of a final determination on appeal, and serve his sentence and not depart the jurisdiction of this Court without leave thereof, then this obligation to be void; otherwise to remain in full force and effect.

/s/ Victor Hiltunen, (Seal)
603 Tower Ave.,
Superior, Wis.

Taken and acknowledged before me at Superior, Wisconsin, this 23rd day of January, A. D. 1956.

/s/ D. R. Wightman,
United States Commissioner.

JUSTIFICATION OF SURETY.

I, the undersigned surety, on oath say that I reside at Superior, Wisconsin, and that I am the sole owner of Five Thousand Dollars (\$5,000.00) in cash or of a United States Treasury Bearer Bond having a face value of Five Thousand Dollars (\$5,000.00) which I am posting as security for bail in the above entitled matter.

I further say that I specifically consent that the sum herein set forth on the United States Treasury Bearer Bond, as the case may be, shall remain posted as security for bail in this case until a final determination has been made by the United States Court of Appeals, or by the United States Supreme Court, as the case may be.

/s/ Victor Hiltunen.

Sworn to and subscribed before me this 23rd day of January, 1956 at Superior, Wisconsin.

/s/ D. R. Wightman.

Approved this 24th day of January, A. D. 1956.

/s/ Patrick T. Stone,
District Judge.

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—13,367) * *

ORDER EXTENDING TIME FOR FILING RECORD
AND DOCKETING APPEAL:

(Filed Feb. 15, 1956. Edgar M. Alstad, Clerk.)

On application of the defendant ex parte, the court being fully advised, it is ordered, that the time for filing the record on appeal with the United States Court of Appeals for the Seventh Circuit, and for docketing therein the appeal taken by defendant by notice of appeal filed January 10, 1956, is extended to March 20th, 1956, pursuant to Rule 39 (c) of the Federal Rules of Criminal Procedure.

/s/ Patrick T. Stone,

United States District Judge.

Dated February 15th, 1956.

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IN THE UNITED STATES DISTRICT COURT.

* * (Caption—13,367) * *

ORDER CERTIFYING EXHIBITS.

(Filed Feb. 20, 1956. Edgar M. Alstad, Clerk.)

On application of the defendant, ex parte, the Court being fully advised, the Clerk of this Court is ordered to certify the exhibits in this cause for inspection by the Court of Appeals, and the Clerk of this Court is further ordered to provide for appropriate safekeeping, transportation and return thereof, after determination of this cause by the Court of Appeals, Seventh Circuit.

/s/ Patrick T. Stone,

United States District Court.

Dated this 20th day of February, 1956.

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Docket Entries.

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Criminal Docket.

Title of Case.

The United States,

vs.

Knut Einer Heikkinen.

(Violation of 8 U. S. C. A. 156(c).) (Immigration.)

Attorneys.

For U. S.:

Frank L. Nikolay.

For Defendant:

Kenneth J. Enkel, 608 Builders Exchange Building,
Minneapolis, Minn.

Cash Received and Disbursed.

Date	Name	Received	Disbursed
11/ 2/53	Kenneth J. Enkel, Atty.	500	
1/18/54	Dep. U. S. Tr. Dec. 1953		500
4/16/54	M. Michael Essin, Atty.	500	
7/20/54	Dep. U. S. Tr. June 1954		500
1/11/56	M. Michael Essin	500	
1/16/56	Dep. U. S. Tr. CD #27		500

Case No.

Closed 4/14/54.

Clerk's Fees

Date	Proceedings	Plaintiff	Defendant
10/14/53	Filed information	(1)	
10/15/53	Filed waiver of indictment	(2)	
10/15/54	Filed transcript of proceedings by John Adams Court Reporter	(3)	
10/15/53	Defendant in Court at Superior without counsel, signed waiver of Indict- ment, Bond set at \$10,000.00. Defendant to be arraigned October 19th or 20th.		

Date	Proceedings	Clerk's Fees Plaintiff Defendant
10/20/53—	Filed motions for setting aside defendants waiver of Indictment and preliminary hearing (4)	
10/20/53—	Filed motion for reduction of Bond Erna (5)	
10/20/53—	Defendant appeared in Court at Superior with counsel, motion made by Mr. Enkel to set aside waiver of Indictment and preliminary hearing, arguments made by Mr. Enkel attorney for defendant. Mr. Knut Heikkinen called to witness stand sworn and testified, direct examination by Mr. Enkel and cross examination by Mr. Nikolay. Mr. Thomas Madden called by 386 Govt., sworn and testified, direct examination by Judge Stone and cross examination by Mr. Enkel, Mr. Harry Gordon called by Govt., sworn and testified, direct examination by Mr. Nikolay and cross examination waived. Court having heard arguments of counsel and being advised in the premises denied a motion for reduction of bail and a petition of Writ of habeas corpus. Defendant arraigned; defendant appeared with counsel, information read, and defendant entered a plea of Not Guilty. Case continued. Defendant to file motions, case set for oral arguments October 28, 1953 at La Crosse, Wisconsin, at 9:00 A. M. Copy of brief to be furnished Govt. by October 24, 1953. Exhibits Nos. 1-2-3 offered	
10/26/53—	Filed Transcript of proceedings had on defendant's motion for reduction of bail, etc. on Oct. 20, 1953, by John R. Adams, Court Reporter. (6)	
10/26/53—	Filed Transcript of proceedings had in connection with arraignment of defendant on Oct. 20, 1953, by John R. Adams, Court Reporter. (7)	
10/23/53—	Filed transcript of Court Reporter John Adams of proceedings Oct. 15, 1953 at Superior (8)	

Date	Proceedings	Clerk's Fees Plaintiff - Defendant
10/28/53	Filed commissioner papers	(9)
10/29/53	Filed Notice of Appeal from oral order of the Court entered Oct. 20, 1953, denying defendant's motion for reduction of bail.	(10)
	(Notice sent to U. S. attorney.)	
11/2/53	Filed stipulation on record on appeal	(11)
11/10/53	Filed Indictment.	(12)
12/7/53	Filed cash bond of defendant in amount of \$3,000.00, deposited in Registry of Court	(13)
12/23/53	Filed mandate from Circuit Court of Appeals, granting motion for reduction of bail and remanding to the Western District of Wisconsin.	(14)
	Copy of opinion attached	
2/4/54	Filed Notice of Motion and Motion to Dismiss Indictment, with admission of service thereon by U. S. Attorney, set for Feb. 9, 1954, at Madison.	(15)
2/9/54	Case called at Madison on defendant's motion to dismiss, appearances: Mr. George Rapp for plaintiff and Mr. Kenneth J. Enkel for defendant. Arguments made on behalf of motion by Mr. Enkel and in opposition thereto by Mr. Rapp. Court heard arguments of counsel and the Court being advised in the premises, denied the motion to dismiss. Case set for trial at Wausau, Wisconsin on April 8, 1954. Defendant waived reading of indictment; entered plea of not guilty.	
4/5/54	Filed motion and notice of motion for an order of Court fixing the time and place for pre-trial discovery of documents pursuant to rule 17(c) of the Federal Rules of Criminal Procedure, noticed for Madison April 7, 1954 at 11:00 A. M.	(16)
4/5/54	Filed subpoena to produce document or object (George E. Rapp); served April 3, 1954	(17)

Date	Proceedings	Clerk's Fees
	Plaintiff	Defendant
4/ 7/54	Filed motion of plaintiff to quash subpoena duces tecum of defendant (18)	

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4/ 7/54—Filed motion and notice of motion by defendant, amending motion for an order of Court fixing the time and place for pre-trial discovery of documents pursuant to rule 17(c) of the Federal Rules of Criminal procedure (19)

4/ 7/54—9:50 A. M. Case called on motion to quash subpoena duces tecum, appearances: Mr. George Rapp and Mr. McDermott for plaintiff and Mr. Michael Essen for defendant. Arguments made on behalf of plaintiff by Mr. Rapp and by Mr. Essen in opposition thereto. The Court being advised in the premises granted the motion of the plaintiff to quash item 1 of defendants motion. Court admits statements after order of deportation allowed and all other matters disallowed as to item 2 of defendants motion. Court denies motion of defendant, and granted motion of plaintiff to quash as to item 3 of defendants motion. Court denies motion of defendant, and granted motion of plaintiff to quash as to item 4 of defendants motion. Court directed that the defendant only to have right to inspect and make notes. No right to photograph.

Counsel for plaintiff reported on documents which can be released for inspection by defendant, and the Court ordered inspection of those documents may be had.
Court adjourned at 2:45 P. M.

4/12/54—10:30 A. M. Case called at Wausau for trial by jury. Appearances: Mr. George Rapp for United States and Mr. Kenneth J. Enkel and Mr. Michael Essin for defendant.

Date	Proceedings	Clerk's Fees	Plaintiff Defendant
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Twenty eight jurors called and sworn on voirdire, counsel for the parties exercise strikes and the remaining twelve were sworn to try the issues in the case.

Mr. Rapp made opening statements to jury and was followed by Mr. Enkel.

Counsel for plaintiff introduced exhibits.

Mr. Harry Gordon was called by plaintiff, sworn and testified, direct examination by Mr. Rapp and cross examination by Mr. Enkel. Recess at 3:10 P. M.

Court reconvened at 3:25 P. M. and Mr. Gordon was recalled to witness stand for further cross examination by Mr. Enkel.

Jury retired to jury room during arguments with reference to exhibits. Jury returned to jury box at 4:05 P. M. and Mr. John Boldin was called as witness for plaintiff, sworn and testified, direct examination by Mr. Rapp, cross examination by Mr. Enkel and Mr. Essin. Statements read to the jury by Mr. Rapp. Recess at 4:55 P. M. to 10:00 A. M. April 13, 1954.

4/12/54—Filed jury list (20)

4/12/54—Filed jury for talesman (21)

4/13/54—Court opened at 10:05 pursuant to adjournment, same appearances. (21)

Statements of defendant read to jury. Mr. John Boldin resumed the witness stand for further examination by the Court. Mr. Paul G. Maki called by plaintiff, sworn and testified, direct examination by Mr. Rapp and cross examination by Mr. Essin.

Plaintiff rests case at 10:45 A. M.

Motion made by counsel for defendant for acquittal. Motion denied by the Court.

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Recess at 10:55 A. M.

Court reconvened at 11:05 A. M.

Defense rests case at 11:10 A. M., Recess to 2:00 P. M.

Date	Proceedings	Clerk's Fees Plaintiff Defendants
	Court reconvened at 2:00 P. M. Closing statements made by Counsel for the parties. Testimony closed at 2:50 P. M. and the Court instructed the jury.	
	Jury retired at 3:10 P. M. to consider the verdict. Defendant makes certain exceptions to instructions of the Court. Recess at 3:20 P. M.	
	Court reconvened at 3:50 P. M. Foreman of jury announced that the jury had reached a verdict. Jury returned to the Court room. Verdict handed to the Court and read.	
	Defendant found Guilty. Court ordered bail continued until April 14, 1954 at 10:00 A. M.	
4/13/54	—Filed verdict	(22)
4/14/54	—Court opened at 10:05 pursuant to adjournment, same appearances	
	Motion made by counsel for defendant to continue bail on appeal, arguments made on behalf of plaintiff. Judgment of Court as follows:	
	It Is Adjudged that the defendant having been convicted upon his plea of Not Guilty and Verdict of Guilty, It Is Adjudged that the defendant be committed to the Custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on Count one and five (5) years on Count two, sentence on count two to run consecutively with sentence on count one, but that execution on count 2 be suspended on condition that within sixty days after completion of service of sentence on count one the defendant make immediate application to leave this country.	
	It Is Further Ordered that the bail of the defendant be increased to \$5,000.00 and that the defendant remain in custody of the U. S. Marshal until bail is furnished.	
	Court adjourned at 10:25 A. M.	
4/14/54	—Filed Judgment and Commitment.	(23)
	Delivered 2 certified copies to U. S. Marshal.	

Date	Proceedings	Clerk's Fees	
		Plaintiff	Defendant
4/16/54	Filed notice of appeal from the judgment entered on April 14, 1954 (Notice mailed to plaintiff)	(24)	
4/16/54	Filed additional bond of defendant in the amount of \$2,000.00, deposited in Registry of Court	(25)	
4/22/54	Filed Transcript of proceedings had on entry of judgment and imposition of sentence on April 14, 1954, at Wausau, by John R. Adams, Court Reporter.	(26)	
5/11/54	Mailed certified copy of notice of appeal and docket entries to Circuit Court of Appeals, pursuant to rule 37, rules of criminal procedure		
5/18/54	Filed certified copy of judgment and commitment, with return of U. S. Marshal thereon, defendant released on April 16, 1954, pending appeal	(27)	
5/19/54	Filed application for order extending time to file record and docket cause in appellate Court	(28)	

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- 5/19/54—Filed order extending time for filing and docketing appeal to June 11, 1954 (29)
- 5/25/54—Filed motion, notice of motion and affidavit of defendant, for leave to permit defendant to travel beyond jurisdiction of this Court, set for Madison, June 2, 1954 at 11:00 A. M. (30)
- 6/ 2/54—Hearing called at Madison on defendant's motion for leave to travel beyond the jurisdiction of this Court. Mr. Essen appeared for the defendant and Mr. Rapp for the government. Mr. Essen argued in favor of the motion; Mr. Rapp argued in opposition; Mr. Essen made further arguments in favor of motion. The motion was denied, without costs.
- 6/ 7/54—Filed transcript of Court proceedings by John Adams Court Reporter hearing had February 9, 1954 at Madison (Copy) (31)

Date	Proceedings	Plaintiff	Defendant
6/ 7/54—	Filed designation of contents of record on appeal by defendant		(32)
6/ 7/54—	Filed statement of points on appeal by defendant		(33)
6/ 7/54—	Filed transcript of Court proceedings at Madison Feb. 9, 1954		(31) (Original)
6/ 7/54—	Filed transcript of Court proceedings had at Madison April 7, 1954		(34)
6/ 7/54—	Filed transcript of Court proceedings had at Wausau April 12-14, 1954		(35)
5/27/55—	Filed Mandate from Circuit Court of Appeals; ordered that the judgment of the District Court in this cause appealed from be, and the same is hereby reversed, and the cause remanded to the District Court with directions to proceed consistent with the views expressed in the opinion of the Circuit Court of Appeals.		(36)
7/19/55—	Filed petition and order that Kenneth J. Enkel, be and he is hereby allowed to withdraw as one of the attorneys for the defendant Knut Einar Heikkinen		(37)
10/31/55—	Filed motion and notice of motion to dismiss indictment by defendant		(38)
10/31/55—	Filed motion and notice of motion, in the alternative, for an order of the Court fixing the time and place for pre-trial discovery of documents pursuant to rule 17c of the Federal Rules of criminal procedure		(39)
	(Motions noticed for hearing on November 8th at 9:00 A. M.)		
10/31/55—	Filed subpoena to produce document or object (George Rapp)		(40)
11/ 3/55—	Filed motion and notice of motion that in the event the motion for dismissal of the indictment is denied, the defendant moves this Court to continue the trial of the above action to a date after January 1, 1956, etc.		(41)

11/ 8/55—Case called at Madison on motion for dismissal and motion for pre-trial discovery of documents pursuant to rule 17c. Appearances: Mr. George Rapp for U. S. and Mr. Michael Essin for defendant. Court heard motions and denied motion for dismissal. On motion for pre-trial discovery, defendant to obtain transcript of deportation proceeding. Set for trial December 12, 1955 at 10:00 A. M. Madison

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11/30/55—Filed motion and notice of motion for review and order holding that no valid deportation order was entered; for dismissal of indictment and for continuance, set for hearing at Wausau on December 1, 1955 at 1:00 A. M. (42)

12/ 1/55—Case called at Wausau for hearing on motions. Appearances: Mr. George Rapp for the government; Mr. Essen for the defendant. The Court heard the arguments of counsel. The Court granted a continuance of the trial until after January 1, 1956. Mr. Rapp presented arguments and introduced Exhibit 1, original deportation proceedings, and Exhibit 2, Exhibits 11, 12, 13, 14 in deportation proceedings. Exhibits were received in evidence. Counsel to file briefs. Arguments to be heard December 12, 1955, at 9:00 a. m. at Madison.

12/13/55—Case called at Madison on motions of defendant, appearances: Mr. George Rapp for U. S. and Mr. M. Michael Essin for defendant, arguments made by Mr. Essin on behalf of motions and the court being advised in the premises finds ample proof to support deportation order, and denied the motions of the defendant. Case set for trial January 9, 1956 at Madison.

Date	Proceedings	Clerk's Fees
Plaintiff	Defendant	
12	24/55—Filed stipulation and order that Governments exhibits 2 through 7 in the above entitled matter be withdrawn from the record of the trial and turned over to George E. Rapp, U. S. Attorney (43)	
1/	9/56—Filed subpoena to testify, Mr. Harry Gordon, served December 31, 1956 (44)	
1/	9/56—Case called for trial by jury at Madison. Appearances: Mr. Rapp for the government; Mr. Essen for the defendant. Twenty-eight jurors were called and sworn on voir dire; counsel exercised their strikes and the remaining twelve jurors were sworn to try the issues in the case. Mr. Rapp and Mr. Essen made opening statements. Recess at 12:00 noon.	
	Trial resumed at 2:15 p. m. In the absence of the jury, the Court stated his decision in regard to the question of certain documents. The jury returned to the court room at 2:30 p. m.	
	Harry Gordon was called by the government and sworn; direct examination by Mr. Rapp; cross examination by Mr. Essen, re-direct examination by Mr. Rapp. John J. Baldin was called by the government and sworn; direct examination by Mr. Rapp; cross examination by Mr. Essen. Trial adjourned at 5:00 p. m.	
1/	9/56—Filed Jury List. (45)	
1/	10/56—Trial resumed at 10:25 a. m. Same appearances. Paul Macki was called by the government and sworn; direct examination by Mr. Rapp; cross examination by Mr. Essen. Government rests case at 11:15 a. m.	
	Mr. Essen moved to dismiss indictment. Motion denied. He then moved for acquittal. Motion denied. Court adjourned at 11:45 a. m.	

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1/10/56—Trial resumed at 2:25 p. m. The defendant rested. Mr. Rapp and Mr. Essen made closing arguments; Mr. Rapp argued in rebuttal. The Court instructed the jury, a bailiff was sworn, and the jury retired at 4:00 p. m. At 4:35 p. m. the jury returned to the courtroom with a verdict of guilty.

Mr. Essen moved for arrest of judgment; the Court denied the motion. He then moved for a new trial; motion denied.

The defendant, having been convicted upon his plea of not guilty and a verdict of guilty, was sentenced to imprisonment for a period of five (5) years on Count 1; the imposition of sentence on Count 2 was suspended until completion of service of sentence on Count 1. The Court ordered that the defendant remain in the custody of the United States Marshal until his appeal was filed; he is then to be released upon the filing of \$5,000 bond, to be approved by the Court.

1/10/56—Filed Verdict. (46)

1/10/56—Filed Judgment and Commitment. (Delivered 2 certified copies to Marshal.) (47)

1/11/56—Filed Notice of Appeal (Sent copy to U. S. Attorney). (48)

1/19/56—Filed Stenographic Transcript of proceedings had on Nov. 8, 1955, upon alternative motions of defendant, by John R. Adams, Court Reporter. (49)

1/24/56—Filed bond of defendant in the amount of \$5,000.00, signed by defendant and Victor Hiltunen as surety (Cash deposited in Registry of Court) (50)

2/15/56—Filed application for order extending time to file record and docket cause in appellate Court (51)

Clerk's Certificate.

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Date	Proceedings	Clerk's Fees	
		Plaintiff	Defendant
2/15/56—	Filed order extending time for filing record and docketing appeal to March 20, 1956		(52)
2/20/56—	Filed application for an order to certify all exhibits for inspection by the Court of appeals		(53)
2/20/56—	Filed order certifying the exhibits in this cause for inspection by the Court of Appeals		(54)
2/23/56—	Filed transcript of Court proceedings by Court Reporter John Adams, proceedings had January 9 and 10, 1956		(55)
2/23/56—	Filed petition and order for withdrawal of bail in amount of \$5,000		(56)
3/14/56—	Filed statement of points on appeal		(57)
3/14/56—	Filed designation of contents of record on appeal		(58)
3/14/56—	Filed court reporters transcript of proceedings of December 1, 1955		(59)
3/14/56—	Filed court reporters transcript of court proceedings of December 13, 1955		(60)

392 United States District Court, }
Western District of Wisconsin. } ss.

I, Edgar M. Alstad, Clerk of the United States District Court for the Western District of Wisconsin, do hereby certify that I have compared the foregoing transcript with the records of this Court now remaining in my office in the case, entitled:

United States of America, }
vs. } No. 13,367-em
Knut Einar Heikkinen. }

and that the same is a true and correct transcript of the documents requested by the parties and ordered certified as follows:

	Doc. No.
1. Indictment dated November 10, 1953	12
2. Defendant's motion to dismiss indictment dated 10/28/55	38

Doc. No.

3. Defendant's motion for pre-trial discovery dated 10/28/55	39
4. Subpoena Duces Tecum to George Rapp, U. S. Atty. dated 10/28/55	40
5. Court Reporters Transcript of proceedings on items 2, 3, and 4 on November 8, 1955	49
6. Defendant's motions for review and order holding that no valid deportation order was entered; and for dismissal of indictment	42
7. Court Reporters Transcript of proceedings on Dec. 1, 1955	59
8. Court Reporters Transcript of proceedings on Dec. 13, 1955	60
9. Court Reporters Transcript of proceedings on Jan. 9, 10, 1956	55
10. Verdict of Jury, dated January 10, 1956	46
11. Judgment and Commitment, dated January 10, 1956	47
12. Notice of Appeal, dated January 11, 1956	48
13. Recognizance dated January 24, 1956	50
14. Order dated February 15, 1956, extending time to March 20, 1956, for filing record and docketing record on appeal	52
15. Order certifying exhibits, dated Feb. 20, 1956	54
16. Statement of Points on appeal, dated March 13, 1956	57
17. Designation of contents of record dated March 13, 1956	58
18. Copy of docket entries	
20. Exhibits Nos. 1 to 9 inclusive	

In Testimony Whereof, I have hereunto set my hand and duly affixed the seal of said Court, at the City of Madison, in said Western District of Wisconsin, this 15th day of March, 1956.

(Seal)

Edgar M. Alstad,
Clerk, U. S. District Court.

[fol. 217] IN THE UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

No. 11709

SEPTEMBER TERM, 1956—JANUARY SESSION, 1957

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

KNUT FINAR HEIKKINEN, Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Wisconsin.

Before DUFFY, Chief Judge, FINNEGAN and SWAIM, Circuit
Judges.

OPINION—January 17, 1957

SWAIM, *Circuit Judge*. The defendant was convicted, under one count, of willfully failing to depart from the United States within six months from the date of an order of deportation entered against him as a resident alien and, under another count, of willfully failing to make timely application in good faith for travel or other documents necessary to his departure, in violation of Section 20(c) of the Immigration Act of 1917, as amended, 64 Stat. 1910 (1950), 8 U.S.C.A. § 156(c), now 8 U.S.C.A. § 1252(c). Defendant was found guilty on both counts in a trial by jury and judgment was entered on the verdict.

A detailed statement of the facts in this case and of the prior litigation to which defendant was a party are necessary to a proper understanding of the issues raised by this appeal.

Defendant is an alien born in Finland in 1890. He emigrated to Canada in 1910 and acquired Canadian citizenship. [fol. 218] ship. In 1916 he entered the United States and was admitted for permanent residence. Subsequent to 1928 defendant made numerous departures from the United States and re-entered without the necessary travel documents and without any apparent difficulty. From 1923 to 1930 and in 1932, 1947 and 1948, while in the United States, defendant was a member of the Communist Party. He spent

approximately three years—from 1932 to 1935—in the U. S. S. R., and returned to the United States in 1935.

In late 1949 defendant was arrested on a warrant and charged with violations of the Immigration Act of 1924, in that at the time of entry, he was an immigrant not in possession of a valid immigration visa, and of the Immigration Act of 1918, as amended, in that he was an alien member of an organization that advocated; taught and distributed printed matter advocating overthrow, by force and violence, of the United States Government. In deportation proceedings held in New York City prior to 1950 defendant was represented by counsel, one Mr. Englander. It appears that this deportation hearing was set aside by the Immigration and Naturalization Service (hereinafter referred to as INS) on its own motion—presumably because of the decision in *Wong Yang Sung v. McGrath*, 339 U.S. 33.

Subsequent to the passage of the Subversive Activities Control Act of 1950, defendant, who had moved to Superior, Wisconsin, was rearrested by the INS and incarcerated in Duluth, Minnesota. The arrest was made pursuant to Section 23 of the Subversive Activities Control Act of 1950. Defendant's arrest and detention without bail caused him to petition for a writ of habeas corpus—the disposition of which is reported in *United States ex rel. Heikkinen v. Gordon*, 8 Cir., 190 F. 2d 16, cert. granted 343 U.S. 903, vacated and remanded 344 U.S. 870.

A hearing *de novo* of the deportation proceedings was scheduled for January 30, 1951, at Duluth, Minnesota. Defendant was again charged with violations of the Immigration Act of 1924 and the Immigration Act of 1918, as amended. A notice of appearance was received on January 25, 1951, from defendant's counsel, Mr. Englander, who had represented defendant in the prior deportation hearing, together with a letter from Mr. Englander to the effect that it was impossible for him to go to Duluth in January 1951, and that it would not be possible for him to be there in the near future. Mr. Englander was notified by INS of receipt of his letter of January 23, and informed that the hearing would be held, as scheduled, at 10:00 A. M. on January 30, 1951, at Duluth. On

January 30, 1951, the deportation hearing commenced in Duluth. Defendant was informed, as he had been repeatedly informed, of his right to counsel. Mr. Englander was not present and defendant stated that Mr. Englander would not be present for the hearing. Defendant further stated that he desired to be represented by Mr. Englander, and requested a continuance to arrange for his attorney to appear. The request was granted and defendant was informed that he should be prepared to proceed with the hearing on March 1, 1951. On February 2, 1951, a copy of the transcript of the hearing on January 30, 1951, was sent to Mr. Englander and he was informed that the hearing would proceed on March 1, 1951. On February 6, 1951, Mr. Englander, in response to the letter of February 2, acknowledged receipt of the transcript and stated his desire to continue representing defendant, but stated that it would be impossible for him to travel to Duluth and requested that the hearing be transferred to New York City. On February 8, 1951, Mr. Englander was advised by the INS that the request for transfer was denied and that the hearing would proceed as scheduled. On February 13, 1951, Mr. Englander, replying to the letter of February 8, protested the denial of his request for transfer to New York City and stated that defendant would not be represented by any attorney. On February 16, 1951, the hearing officer informed Mr. Englander that the hearing would proceed on March 1, 1951. At the hearing held on March 1, 1951, additional charges were lodged against defendant, and he was granted a further continuance. Proceedings were resumed on April 12, 1951, without counsel for defendant appearing.

An order recommending deportation was entered by the hearing officer who conducted the hearing. Written exceptions were filed by Mr. Englander to the recommended order. On October 8, 1951, an order was entered by the Assistant Commissioner of the INS, adopting the recommended order with certain changes therein. An appeal to the Board of Immigration Appeals of the INS was heard on February [fol. 220] 6, 1952, and the appeal was dismissed on April 8, 1952.

On April 30, 1952, the officer in charge of the INS at Duluth notified defendant, by registered mail, that an

order directing his deportation had been entered on April 25, 1952. The letter also informed defendant of his duties under Section 156(c).

On October 14, 1953, an information was filed in the District Court for the Western District of Wisconsin charging defendant with violation of 8 U.S.C.A. § 156(c). Defendant was taken into custody and bail was set in the amount of \$10,000. Another dispute concerning defendant's bail arose which was disposed of by this court in *Heikkinen v. United States*, 7 Cir., 208 F. 2d 738. Bail was subsequently reduced and posted and defendant was released.

On November 10, 1953, defendant was indicted and found guilty on the same counts involved in the instant case. Defendant appealed from the sentence and judgment, and this court reversed the judgment of the District Court and remanded with directions. *United States v. Heikkinen*, 7 Cir., 221 F. 2d 890. This court held that a valid order of deportation was a prerequisite of the statutory crime with which defendant was charged; that defendant was entitled to attack the validity of the deportation order; and that for the purpose of making a determination thereon, it was incumbent upon the trial court to review the proceedings before the administrative agency upon which the order was predicated.

A new trial was had on January 9 and 10, 1956. The trial court found that a valid order of deportation had been entered against defendant, and he was again found guilty on both counts of the indictment in a trial by jury.

Defendant claims that he was denied due process of law in the deportation proceeding; that Section 156(c) and the judgment entered thereunder violated defendant's rights under the Fifth and Sixth Amendments; that there was no affirmative duty upon defendant to effect his departure after the final order of deportation was entered; that Section 156(c) and the judgment thereunder are repugnant to the *ex post facto* clause of the Constitution; that the indictment failed to state facts sufficient to constitute an offense against [fol. 221] the United States; that the evidence was insufficient to sustain a conviction.

Defendant claims that there was no proper or valid

record before the trial court for it to review in determining the validity of the order of deportation entered against him. He argues that the revelant documents were not brought in, as prescribed by this court in *United States v. Heikkinen*, 7 Cir., 221 F. 2d 890, notwithstanding the fact that he filed appropriate motions and the trial court ordered the government to do so; and that the trial court erred in receiving over objections such documents as were offered by the government. Exhibit 1 in this cause contains the transcript of the deportation hearing; the hearing officer's decision; the exceptions to the hearing officer's decision; the Commissioner's decision and order; notice of appeal; the Board of Immigration Appeals' order and warrants, together with all exhibits contained in the deportation hearing with the exception of Exhibits 11, 12, 13 and 14 which had been lost or destroyed. There were attached copies of Exhibits 11, 12, 13 and 14 which had been reproduced from other sources. Subsequent to the introduction of Exhibit 1 into the record, Exhibit 2 was offered by the government and received by the trial court. Exhibit 2 contained the originals of Exhibits 11, 12, 13 and 14. The reproductions of these exhibits were not withdrawn from the record and both the originals and reproductions were available to the trial court. Defendant contends that the substitution was made *ex parte* and unlawfully. He omits the fact, however, that Exhibits 11, 12, 13 and 14 of Exhibit 1 are identical in all respects, save one, with their counterparts in Exhibit 2. Exhibits 12, 13 and 14 of Exhibit 2 are copies of the *Daily Worker* for dates March 11, 1929, May 21, 1929, and May 25, 1929. Exhibits 12, 13 and 14 of Exhibit 1 are copies of the same newspaper for the same dates containing word for word the identical matter in the originals, but of different editions. Exhibit 11 of Exhibit 1 is a transcript of the testimony of defendant given at a hearing held on the petition of defendant for a writ of habeas corpus on November 10, 1950, before the United States District Court for the District of Minnesota. Exhibit 11 of Exhibit 2 is a certified copy of the same testimony, but contains in addition the testimony given at such hearing by an immigration official. Defendant has not demonstrated, as he obviously

could not, that he was in any manner prejudiced by the substitution. There was no discrepancy that could have possibly affected the trial court's review of the deportation proceeding in determining whether a valid order of deportation had been entered against defendant. Even if it be assumed that the substitution should not have been made *ex parte* and that the reproductions should have been withdrawn from the record when the originals were produced, defendant's argument is not furthered in the slightest degree. Any error, defect, irregularity or variance which does not affect the substantial rights of defendant must be disregarded. Rule 52(a), Federal Rules of Criminal Procedure, 18 U.S.C.A.

Defendant objects to the presence of the deportation warrants in the record. At worst, they are mere surplusage, having no relevancy to the question of the validity of the deportation order, and there is nothing in the warrants which in any manner might have affected the trial court's review of the deportation proceedings.

Defendant finally claims that a letter dated January 19, 1951, from the District Director of the INS at Chicago to the officer in charge of the INS office at St. Paul, Minnesota, was erroneously omitted from the record. This letter was an intradepartmental letter pertaining to the question of the appearance of a certain court reporter as a witness at the defendant's deportation hearing, if such hearing were to be held in New York City. This letter obviously had no bearing on the validity of the deportation order.

We conclude therefore that there was a proper or valid record before the trial court for it to review and that no error was committed concerning the admission of documents.

Defendant asserts that he was deprived of the right to counsel in the deportation proceeding. The basis of this contention as advanced by defendant is that since the deportation proceeding was originally instituted in New York and subsequently transferred to Duluth, Minnesota, he was deprived of the assistance of Mr. Englander, who found it impossible to travel to Duluth, and that, therefore, the proceedings should have been transferred to New York as requested by defendant. And as evidence

[fol. 223] that the INS acted arbitrarily and capriciously, defendant points to the fact that two government witnesses were transported at government expense from New York City, where they resided, to Duluth to testify against defendant. During the interim, however, defendant had moved from New York City to Superior, Wisconsin, a small town near Duluth. The City of Superior became defendant's residence and place of employment and was the place where he was arrested. In view of these facts it would appear that the locality where defendant was then living was the proper place to file and hear the deportation proceedings. See *United States ex rel. Mastoras v. McCandless*, 3 Cir., 61 F. 2d 366, 368. In any event, we cannot say that the immigration authorities' choice of time and place was unreasonable or arbitrary. Nor does it appear that the denial of defendant's request to transfer the proceedings to New York constitutes a deprivation of defendant's right to counsel. We have recited with some detail the correspondence between the INS and Mr. Englander concerning the choice of place for holding the hearings and Mr. Englander's asserted inability to travel to Duluth. It is evident from the correspondence that Mr. Englander gave little, if any, consideration to the possibility of his traveling to Duluth. In addition, defendant was granted two continuances for the purpose of enabling him to secure counsel—from January 30, 1951 to March 1, 1951, and from March 1, 1951 to April 12, 1951. Nevertheless, Mr. Englander still refused to travel to Duluth for the hearings even though defendant steadfastly insisted that he wanted to be represented by Mr. Englander. Cf. *United States ex rel. Gould v. Uhl*, S.D. N.Y., 6 F. Supp. 696. In short, defendant, who was repeatedly informed of his right to counsel and was given more than ample opportunity to secure the assistance of counsel, chose to proceed without counsel. Due process certainly did not require that the hearing be moved from Duluth to New York City in order that defendant might have the services of Attorney Englander who refused to come to Duluth to act as defendant's counsel.

Defendant contends that he was deprived of his liberty in violation of his rights to due process and to the safeguards of a criminal trial in that the finding that he was

an alien guilty of conduct subjecting him to deportation does not require proof beyond reasonable doubt, but may be made on mere preponderance of evidence. In essence, [fol. 224] defendant urges that the issue of the validity of the order of deportation must be tried in the criminal trial by the jury. Defendant finds support for this contention in Mr. Justice Jackson's dissenting opinion in *United States v. Spector*, 343 U.S. 169, 174. However, the concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal practice. The constitutional right to trial by jury does not include the right to have that body pass on the validity of an administrative order. *Cox v. United States*, 332 U.S. 442; *Estep v. United States*, 327 U.S. 114; *Yakus v. United States*, 321 U.S. 414. Although defendant is entitled to attack the validity of the order, *United States v. Heikkinen*, 7 Cir., 221 F. 2d 890, he has full protection by having the issue submitted to the trial judge and the reviewing courts as was done in the instant case. The case of *Wong Wing v. United States*, 163 U.S. 228, cited by defendant and relied upon by Mr. Justice Jackson in the *Spector* case is not in point. The Court held in that case that Congress could not "declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property * * * unless provision were made that the fact of guilt should first be established by a judicial trial." 163 U.S. at p. 237. The question of guilt under Section 156(c) is resolved by a judicial trial with all its inherent safeguards. The indictment in the instant case charged defendant with willful failure to depart from the United States and willful failure to make timely application in good faith for necessary travel documents, and the question whether defendant had committed the crimes thus charged was properly the only issue submitted to the jury.

Defendant also argues that the conviction herein, resting upon a previous determination in deportation proceedings, is obnoxious to due process of law for the added reason that the defendant was adjudged deportable in such proceeding by an immigration officer who was not fair and impartial, in that he performed both the function of judge

and prosecutor. However, at the time the order in question was entered, the pertinent provisions of the Administrative Procedure Act, 5 U.S.C.A. § 1001 et seq., were not applicable to deportation proceedings. 8 U.S.C.A. § 155(a); *Belizaro v. Zimmerman*, 3 Cir., 200 F. 2d 282.

[fol. 225] Defendant contends that Section 156(c) imposed no affirmative duty upon him to effect his departure; that under this statute the only duties which rest with the alien are: (a) not to conceal his whereabouts after the final order of deportation has been entered, and (b) to present himself for deportation when requested to do so by the Attorney General. However, Section 156(c) defines four specific, different acts or omissions to act as constituting a crime: (1) willful failure or refusal to depart; (2) willful failure or refusal to make timely application in good faith for necessary travel documents; (3) connivance or conspiracy or any other action, designed to prevent or hamper the alien's departure, or with the purpose of so doing; and (4), willful failure or refusal of the alien to present himself for deportation as required by the Attorney General. Defendant's proposed construction of the Act would read out of the Act the crimes defined above in 1 and 2 (labeled for convenience). This we may not do. Defendant was charged with willful failure to perform certain enumerated acts. "Failure" is an omission to perform a duty or appointed function; and the duty in this instance was for defendant to make timely application in good faith for the necessary travel documents and to depart from the United States within six months from the date of the order of deportation. The defendant performed neither of these duties. The fact that the Attorney General was under a duty to effect the defendant's departure from this country did not, of course, excuse the defendant from taking the steps which the Act expressly required of him. The trial court correctly instructed the jury that Section 156(c) imposes upon the alien "an affirmative duty and an obligation on his part to take specific steps towards effecting his own departure from the United States and to that end to make timely application for travel or other documents necessary to such departure." The scope and extent of the Attorney General's efforts, if any, to effect defendant's departure are immaterial to the question of whether

defendant discharged the duties imposed upon him. Nor is it necessary that it be shown that there was a country available which would admit defendant. The choice of a country willing to receive defendant is left in the first instance to the defendant himself. *United States v. Spector*, 343 U. S. 169, 171. If defendant has made timely application in good faith for necessary travel documents which [fol. 226] are refused because no country is willing to receive him, he has not violated Section 156(c). *United States v. Spector, supra*, at p. 172. But the defendant cannot claim as a defense the fact that no country will receive him unless he has discharged the duty imposed upon him of making timely application for the necessary travel documents. We do not now attempt to define "in good faith" as used in this portion of the Act because here the defendant did not make even a gesture towards effecting his departure.

Defendant next urges that Section 156(c), in so far as it imposed a penalty for an act that was committed before the statute was enacted, is void because it is an *ex post facto* law.² The government apparently failed to perceive the purport of defendant's argument and merely answered defendant by citing the principle that the *ex post facto* clause of the Constitution has no application to deportation proceedings. However, this phase of defendant's appeal is not an attack upon the deportation proceeding or the order of deportation that was subsequently entered against him, but upon the penal sanction that was imposed on him in a criminal proceeding—to which the *ex post facto* prohibition is obviously applicable. Nevertheless, defendant's contention must fail because he is not being punished for an act that was not punishable at the time it was committed, or being punished in addition to that then proscribed. Section 156(c) became effective September 23, 1950. The order directing defendant's deportation was entered on April 25, 1952, and defendant was indicted on November 10, 1953. Defendant's failure to act, here complained of, occurred subsequent to April 25, 1952, and therefore subsequent to the effective date of the Act. Thus, the criminal acts for which defendant was convicted were committed subsequent to the effective date of Section 156(c), and that section clearly informed the defendant

that his failure to act as here charged would be punishable as prescribed by the Act. Nor does Section 156(c) add a new punishment to that before prescribed. Defendant insists that he was not warned that under some future statute his wrongful conduct, *i.e.*, communist activities or affiliations, would subject him to a penalty in addition to deportation if, when ordered deported, he should fail or refuse to depart from this country. However, in this cause defendant is not being punished for his alleged communist activities or affiliations, but for his willful failure to make timely application for necessary travel documents and to [fol. 227] depart from the United States. Defendant's conduct which subjected him to deportation occurred prior to the effective date of Section 156(c), but the penalty is imposed for acts committed subsequent to the Act of September 23, 1950, which is a new and isolated enactment that relates to the antecedent deportable conduct only in the sense that such conduct was necessary to a valid order of deportation which, in turn, is a prerequisite to a conviction under Section 156(c).

Defendant urges that the indictment herein is fatally defective under the statute because it failed to allege: (1) knowledge by defendant of the entry of the order of deportation and of the contents thereof; (2) the defendant's freedom to depart from this country, and the willingness of some foreign country to admit him into its territory; (3) by what authority, or upon or pursuant to what hearing, if any, an order of deportation was issued, and whether such hearing, if any, accorded him due process; (4) the country to which defendant was ordered deported; (5) the country of origin of the defendant or the country of which he is, or last was, a citizen. Items 2, 4 and 5 are necessary allegations only under defendant's erroneous interpretation of Section 156(c) which has already been disposed of. Item 1 is properly an evidentiary matter relegated to the trial and, in any event, an indictment which substantially follows the wording of a statutory crime, as was the case here, is sufficient. *Jelke v. United States*, 7 Cir., 255 Fed. 264, and the indictment clearly informed defendant of the charge against him in such a manner that he could prepare his defense. Although defendant is entitled to attack the

validity of the deportation order, it is not necessary for the indictment to allege that defendant was accorded due process of law before the administrative tribunal nor pursuant to what authority or hearing the order was issued. None of these elements are part of the crime with which defendant was charged.

Finally, the concurring opinion of Judge Major, joined in by Judge Schmackenbergh, in *United States v. Heikkinen*, 7 Cir., 221 F. 2d 890, 893, which involved the same indictment as that in the instant case, stated, at p. 893:

"Nothing was placed in issue by defendant's motion to dismiss the indictment other than the legal question as to whether an offense was charged under the terms [fol. 228] of the statute. If not, defendant was entitled to have the charge dismissed and that would have ended the matter. I think, however, that the indictment stated a good cause of action and that the motion to dismiss was properly denied."

We have made an examination of the record before us and find that it contains substantial proof to support the verdict of the jury.

The judgment is affirmed.

[fol. 229] IN UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

Before: Hon. F. Ryan Duffy, Chief Judge, Hon. Philip
J. Finnegan, Circuit Judge, Hon. H. Nathan Swain, Cir-
cuit Judge.

No. 11709

THE UNITED STATES OF AMERICA, Plaintiff-Appellee

VS.

Knut EINAR HEIKKINEN, Defendant-Appellant

Appeal from the United States District Court for the
Western District of Wisconsin.

JUDGMENT—January 17, 1957

This cause came on to be heard on the transcript of the
record from the United States District Court for the West-
ern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by
this court that the judgment of the said District Court in
this cause appealed from be, and the same is hereby, af-
firmed.

[fol. 230] UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—February 4, 1957

It is ordered by the Court that the petition for a rehear-
ing of this cause be, and the same is hereby, denied.

[fol. 231] Clerk's Certificate to foregoing transcript omit-
ted in printing.

[fol. 232] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1956

No. 819

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed April 22, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5485-8)

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JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 89

KNUT FINAR HEIKKINEN, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR PETITIONER

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 89

KNUT EINAR HEIKKINEN, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 217-228)
is reported at 240 F. 2d 94.

JURISDICTION

The judgment of the Court of Appeals was entered on January 17, 1957 (R. 229), and a petition for rehearing was denied on February 4, 1957 (R. 229). The petition for certiorari was filed on March 6, 1957, and certiorari was granted on April 22, 1957 (R. 230). The jurisdiction of the Court rests on 28 U. S. C., sec. 1254(1).

STATUTES INVOLVED

Section 23 of the Internal Security Act of 1950, 64 Stat. 1010, amended the Immigration Act of February 5, 1917 to add section 20(c) as follows:

"Any alien against whom an order of deportation is outstanding under (1) the Act of October 16, 1918, as amended (40 Stat. 1012; 41 Stat. 1008, 54 Stat. 673, 8 U. S. C. 137); (2) the Act of February 9, 1909 as amended (35 Stat. 614, 42 Stat. 596; 21 U.S.C. 171, 174-175); (3) the Act of February 18, 1931, as amended (46 Stat. 1171, 54 Stat. 673, 8 U. S. C. 156a; or (4) so much of section 19 of the Immigration Act of 1917, as amended (39 Stat. 889-890; 54 Stat. 671-673, 56 Stat. 1044; 8 U. S. C. 155) as relates to criminals, prostitutes, procurers, or other immoral persons, anarchists, subversives and similar classes, who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of the Subversive Activities Control Act of 1950 whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: Provided, That this subsection shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration.

ation or custody: Provided further, That the court may for good cause suspend the sentence of such alien and order his release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify releasing the alien, the court shall take into account such factors as (1) the age, health, and period of detention of the alien; (2) the effect upon the national security and public peace or safety; (3) the likelihood of the alien's following a course of conduct which made or would make him deportable; (4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States; (5) the reason for the inability of the Government of the United States to secure passports, other travel documents, or deportation facilities from the country or countries to which the alien has been ordered deported; and (6) the eligibility of the alien for discretionary relief under the immigration laws."

Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008, amended section 1 of the Immigration Act of October 16, 1918, to provide in part as follows:

"That any alien who is a member of any one of the following classes shall be excluded from admission into the United States.

* * * * *

(2) Aliens who, at any time, shall be or shall have been members of the following classes:

* * * * *

¹ The statute, with some revisions, was carried forward in section 242(e) of the Immigration and Nationality Act of 1952, 8 U. S. C. Sec. 1252(e).

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party; regardless of what name such group or organization may have used, may now bear, or may hereafter adopt. . . .”

The aforesaid Section 22 amended Section 4 of the Immigration Act of October 16, 1918, to provide in part:

“(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.”²

QUESTIONS PRESENTED

1. Whether the “self-deportation” statute (section 20(c) of the Immigration Act of 1917, added by sec-

² These provisions were repealed by Section 403(a)(16) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 279. The 1952 Act recodified and reenacted those provisions without material change. See Section 241(a)(6)(C), 66 Stat. 204, 8 U. S. C. 1251(a)(6)(C).

tion 23 of the Internal Security Act of 1950, 64 Stat. 1010), is unconstitutional on its face or as applied in this case.

2. Whether the crime of willful failure to depart may be committed before travel documents have been obtained by reason of a failure to apply for travel documents.

3. Whether the trial court's instructions erroneously eliminated the necessity for proof of willfulness and criminal intent.

4. Whether the statute applies to persons ordered deported under the provisions added to the Immigration Act of October 16, 1918 by the Internal Security Act of 1950.

5. Whether the petitioner was convicted under an erroneous construction and application of the statute.

6. Whether the conviction is supported by the evidence.

7. Whether the petitioner was properly convicted, when the sole evidence against him consisted of an uncorroborated confession.

8. Whether the trial court abused his discretion in refusing to suspend sentence in accordance with the provisions and standards laid down in the statute.

STATEMENT OF THE CASE

The petitioner was convicted on both counts of a two-count indictment (R. 179-81). The indictment alleged that he had been ordered deported on April 9, 1952, on the ground of membership in the Communist Party after entry. The first count charged him with

willfully failing to depart from the United States during the six months period following April 9, 1952. The second count charged, that during that same period the petitioner "did willfully fail to make timely application in good faith for travel or other documents necessary to his departure from the United States." (R. 1-2):

The petitioner is an alien, 67 years of age, a native of Finland, who was first admitted into the United States for permanent residence in 1916, and whose last entry into the United States was in 1935. He has resided in the United States since that date.³ After several proceedings before the Immigration and Naturalization Service, the petitioner, on October 8, 1951 was ordered deported by the Assistant Commissioner of the Immigration Service (R. 70-71). The petitioner appealed from this order and on April 9, 1952 the Board of Immigration Appeals dismissed the appeal (R. 71). The deportation order was based upon a finding that the petitioner had been a member of the Communist Party from about 1922 to 1930,⁴ and was therefore deportable under the Internal Security Act of 1950, amending the Immigration Act of October 16,

³ See pp. 7-17 of the transcript of a hearing on a petition for habeas corpus in the United States District Court for the District of Minnesota, November 10, 1950, introduced as Exhibit 11 of the deportation hearing which was introduced as Exhibit 1 at the trial.

⁴ The opinion below states that the petitioner was a member of the Communist Party in 1932, 1947, and 1948 (R. 217). There was evidence to that effect in the deportation hearing, but the Board of Immigration Appeals, which is the final adjudicating body in the Service, limited its findings of Communist Party membership to the period 1922 to 1930.

1918 (see decision of Board of Immigration Appeals, Exhibit No. 1).⁵

On or about April 18, 1952, Mr. Maki, a representative of the Service, called upon petitioner and interviewed him for the purpose of filling out a Service form headed "Passport Data for Alien Deportees" (Exhibit 9, R. 127). This was the form utilized by the Service to obtain the personal history of a deportee in order to enable the Service to procure, in accordance with its usual practice, the necessary travel documents for the alien (R. 82, 89, 128, 132, 138-41). Maki testified that he told petitioner that the executed form was to be used by the government for the purpose of getting travel documents for him (R. 128, 138, 144-5). The petitioner fully cooperated and gave all the necessary information (R. 137). The form was duly forwarded to the Chicago office of the Service for processing (R. 89, 102, 127, 128, 138). The trial court ruled out all efforts of petitioner to learn what was done with this form or what steps were taken by the government to obtain travel documents for the deportation of the petitioner (R. 19-21), on the ground that the government owed the petitioner "no duty" (R. 19).

On April 30, 1952, the Officer-In-Charge of the Duluth, Minnesota, office of the Service wrote to the petitioner on a mimeographed form as follows (emphasis added):

⁵ The order of deportation was also based upon a finding that the petitioner had last entered the United States without a valid immigration visa. This ground is not involved here since it is not one of the grounds for deportation to which the criminal statute applies.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11709 September Term, 1956—January Session, 1957

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

KNUT EINAR HEIKKINEN, *Defendant-Appellant*.

Appeal from the United States District Court for the
Western District of Wisconsin

January 17, 1957

Before DUFFY, *Chief Judge*, FINNEGAN and SWAIM,
Circuit Judges.

SWAIM, *Circuit Judge*. The defendant was convicted, under one count, of willfully failing to depart from the United States within six months from the date of an order of deportation entered against him as a resident alien and, under another count, of willfully failing to make timely application in good faith for travel or other documents necessary to his departure, in violation of Section 20(c) of the Immigration Act of 1917, as amended, 64 Stat. 1010 (1950), 8 U.S.C.A. § 156(c), now 8 U.S.C.A. § 1252(c). Defendant was found guilty on both counts in a trial by jury and judgment was entered on the verdict.

A detailed statement of the facts in this case and of the prior litigation to which defendant was a party are

necessary to a proper understanding of the issues raised by this appeal.

Defendant is an alien born in Finland in 1890. He emigrated to Canada in 1910 and acquired Canadian citizenship. In 1916 he entered the United States and was admitted for permanent residence. Subsequent to 1928 defendant made numerous departures from the United States and re-entered without the necessary travel documents and without any apparent difficulty. From 1923 to 1930 and in 1932, 1947 and 1948, while in the United States, defendant was a member of the Communist Party. He spent approximately three years—from 1932 to 1935—in the U. S. S. R., and returned to the United States in 1935.

In late 1949 defendant was arrested on a warrant and charged with violations of the Immigration Act of 1924, in that at the time of entry, he was an immigrant not in possession of a valid immigration visa, and of the Immigration Act of 1918, as amended, in that he was an alien member of an organization that advocated, taught and distributed printed matter advocating overthrow, by force and violence, of the United States Government. In deportation proceedings held in New York City prior to 1950 defendant was represented by counsel, one Mr. Englander. It appears that this deportation hearing was set aside by the Immigration and Naturalization Service (hereinafter referred to as INS) on its own motion—presumably because of the decision in *Wong Yang Sung v. McGrath*, 339 U.S. 33.

Subsequent to the passage of the Subversive Activities Control Act of 1950, defendant, who had moved to Superior, Wisconsin, was rearrested by the INS and incarcerated in Duluth, Minnesota. The arrest was made pursuant to Section 23 of the Subversive Activities Control Act of 1950. Defendant's arrest and detention without bail caused him to petition for a writ of habeas corpus—the disposition of which is reported in *United States ex*

rel. *Heikkinen v. Gordon*, 8 Cir., 190 F.2d 16, cert. granted 343 U.S. 903, vacated and remanded 344 U.S. 870.

A hearing *de novo* of the deportation proceedings was scheduled for January 30, 1951, at Duluth, Minnesota. Defendant was again charged with violations of the Immigration Act of 1924 and the Immigration Act of 1918, as amended. A notice of appearance was received on January 25, 1951, from defendant's counsel, Mr. Englander, who had represented defendant in the prior deportation hearing, together with a letter from Mr. Englander to the effect that it was impossible for him to go to Duluth in January 1951, and that it would not be possible for him to be there in the near future. Mr. Englander was notified by INS of receipt of his letter of January 23, and informed that the hearing would be held, as scheduled, at 10:00 A.M. on January 30, 1951, at Duluth. On January 30, 1951, the deportation hearing commenced in Duluth. Defendant was informed, as he had been repeatedly informed, of his right to counsel. Mr. Englander was not present and defendant stated that Mr. Englander would not be present for the hearing. Defendant further stated that he desired to be represented by Mr. Englander, and requested a continuance to arrange for his attorney to appear. The request was granted and defendant was informed that he should be prepared to proceed with the hearing on March 1, 1951. On February 2, 1951, a copy of the transcript of the hearing on January 30, 1951, was sent to Mr. Englander and he was informed that the hearing would proceed on March 1, 1951. On February 6, 1951, Mr. Englander, in response to the letter of February 2, acknowledged receipt of the transcript and stated his desire to continue representing defendant, but stated that it would be impossible for him to travel to Duluth and requested that the hearing be transferred to New York City. On February 8, 1951, Mr. Englander was advised by the INS that the request for transfer was denied and that the hearing would proceed

as scheduled. On February 13, 1951, Mr. Englander, replying to the letter of February 8, protested the denial of his request for transfer to New York City and stated that defendant would not be represented by an attorney. On February 16, 1951, the hearing officer informed Mr. Englander that the hearing would proceed on March 1, 1951. At the hearing held on March 1, 1951, additional charges were lodged against defendant, and he was granted a further continuance. Proceedings were resumed on April 12, 1951, without counsel for defendant appearing.

An order recommending deportation was entered by the hearing officer who conducted the hearing. Written exceptions were filed by Mr. Englander to the recommended order. On October 8, 1951, an order was entered by the Assistant Commissioner of the INS, adopting the recommended order with certain changes therein. An appeal to the Board of Immigration Appeals of the INS was heard on February 6, 1952, and the appeal was dismissed on April 8, 1952.

On April 30, 1952, the officer in charge of the INS at Duluth notified defendant, by registered mail, that an order directing his deportation had been entered on April 25, 1952. The letter also informed defendant of his duties under Section 156(c).

On October 14, 1953, an information was filed in the District Court for the Western District of Wisconsin charging defendant with violation of 8 U.S.C.A. § 156(c). Defendant was taken into custody and bail was set in the amount of \$10,000. Another dispute concerning defendant's bail arose which was disposed of by this court in *Heikkinen v. United States*, 7 Cir., 208 F. 2d 738. Bail was subsequently reduced and posted and defendant was released.

On November 10, 1953, defendant was indicted and found guilty on the same counts involved in the instant case. Defendant appealed from the sentence and judg-

ment, and this court reversed the judgment of the District Court and remanded with directions. *United States v. Heikkinen*, 7 Cir., 221 F. 2d 890. This court held that a valid order of deportation was a prerequisite of the statutory crime with which defendant was charged; that defendant was entitled to attack the validity of the deportation order; and that for the purpose of making a determination thereon, it was incumbent upon the trial court to review the proceedings before the administrative agency upon which the order was predicated.

A new trial was had on January 9 and 10, 1956. The trial court found that a valid order of deportation had been entered against defendant, and he was again found guilty on both counts of the indictment in a trial by jury.

Defendant claims that he was denied due process of law in the deportation proceeding; that Section 156(c) and the judgment entered thereunder violated defendant's rights under the Fifth and Sixth Amendments; that there was no affirmative duty upon defendant to effect his departure after the final order of deportation was entered; that Section 156(c) and the judgment thereunder are repugnant to the *ex post facto* clause of the Constitution; that the indictment failed to state facts sufficient to constitute an offense against the United States; that the evidence was insufficient to sustain a conviction.

Defendant claims that there was no proper or valid record before the trial court for it to review in determining the validity of the order of deportation entered against him. He argues that the relevant documents were not brought in, as prescribed by this court in *United States v. Heikkinen*, 7 Cir., 221 F. 2d 890, notwithstanding the fact that he filed appropriate motions and the trial court ordered the government to do so; and that the trial court erred in receiving over objections such documents as were offered by the government. Exhibit 1 in this cause contains the transcript of the deportation hearing:

the hearing officer's decision; the exceptions to the hearing officer's decision; the Commissioner's decision and order; notice of appeal; the Board of Immigration Appeals' order and warrants, together with all exhibits contained in the deportation hearing with the exception of Exhibits 11, 12, 13 and 14 which had been lost or destroyed. There were attached copies of Exhibits 11, 12, 13 and 14 which had been reproduced from other sources. Subsequent to the introduction of Exhibit 1 into the record, Exhibit 2 was offered by the government and received by the trial court. Exhibit 2 contained the originals of Exhibits 11, 12, 13 and 14. The reproductions of these exhibits were not withdrawn from the record and both the originals and reproductions were available to the trial court. Defendant contends that the substitution was made *ex parte* and unlawfully. He omits the fact, however, that Exhibits 11, 12, 13 and 14 of Exhibit 1 are identical in all respects, save one, with their counterparts in Exhibit 2. Exhibits 12, 13 and 14 of Exhibit 2 are copies of the Daily Worker for dates March 11, 1929, May 21, 1929, and May 25, 1929. Exhibits 12, 13 and 14 of Exhibit 1 are copies of the same newspaper for the same dates containing word for word the identical matter in the originals, but of different editions. Exhibit 11 of Exhibit 1 is a transcript of the testimony of defendant given at a hearing held on the petition of defendant for a writ of habeas corpus on November 10, 1950, before the United States District Court for the District of Minnesota. Exhibit 11 of Exhibit 2 is a certified copy of the same testimony, but contains in addition the testimony given at such hearing by an immigration official. Defendant has not demonstrated, as he obviously could not, that he was in any manner prejudiced by the substitution. There was no discrepancy that could have possibly affected the trial court's review of the deportation proceeding in determining whether a valid order of deportation had been entered against de-

fendant. Even if it be assumed that the substitution should not have been made *ex parte* and that the reproductions should have been withdrawn from the record when the originals were produced, defendant's argument is not furthered in the slightest degree. Any error, defect, irregularity or variance which does not affect the substantial rights of defendant must be disregarded. Rule 52(a), Federal Rules of Criminal Procedure, 18 U.S.C.A.

Defendant objects to the presence of the deportation warrants in the record. At worst, they are mere surplusage, having no relevancy to the question of the validity of the deportation order, and there is nothing in the warrants which in any manner might have affected the trial court's review of the deportation proceedings.

Defendant finally claims that a letter dated January 19, 1954, from the District Director of the INS at Chicago to the officer in charge of the INS office at St. Paul, Minnesota, was erroneously omitted from the record. This letter was an intradepartmental letter pertaining to the question of the appearance of a certain court reporter as a witness at the defendant's deportation hearing, if such hearing were to be held in New York City. This letter obviously had no bearing on the validity of the deportation order.

We conclude therefore that there was a proper or valid record before the trial court for it to review and that no error was committed concerning the admission of documents.

Defendant asserts that he was deprived of the right to counsel in the deportation proceeding. The basis of this contention as advanced by defendant is that since the deportation proceeding was originally instituted in New York and subsequently transferred to Duluth, Minnesota, he was deprived of the assistance of Mr. Englander, who found it impossible to travel to Duluth, and that, therefore, the proceedings should have been trans-

ferred to New York as requested by defendant. And as evidence that the INS acted arbitrarily and capriciously, defendant points to the fact that two government witnesses were transported at government expense from New York City, where they resided, to Duluth to testify against defendant. During the interim, however, defendant had moved from New York City to Superior, Wisconsin, a small town near Duluth. The City of Superior became defendant's residence and place of employment and was the place where he was arrested. In view of these facts it would appear that the locality where defendant was then living was the proper place to file and hear the deportation proceedings. See *United States ex rel. Mastoras v. McCandless*, 3 Cir., 61 F. 2d 366, 368. In any event, we cannot say that the immigration authorities' choice of time and place was unreasonable or arbitrary. Nor does it appear that the denial of defendant's request to transfer the proceedings to New York constitutes a deprivation of defendant's right to counsel. We have recited with some detail the correspondence between the INS and Mr. Englander concerning the choice of place for holding the hearings and Mr. Englander's asserted inability to travel to Duluth. It is evident from the correspondence that Mr. Englander gave little, if any, consideration to the possibility of his traveling to Duluth. In addition, defendant was granted two continuances for the purpose of enabling him to secure counsel—from January 30, 1951 to March 1, 1951, and from March 1, 1951 to April 12, 1951. Nevertheless, Mr. Englander still refused to travel to Duluth for the hearings even though defendant steadfastly insisted that he wanted to be represented by Mr. Englander. Cf. *United States ex rel. Gould v. Uhl*, S.D. N.Y., 6 F. Supp. 696. In short, defendant, who was repeatedly informed of his right to counsel and was given more than ample opportunity to secure the assistance of counsel, chose to proceed without counsel. Due process certainly did not require that the hearing be moved from Duluth to New York City in order that defendant

might have the services of Attorney Englander who refused to come to Duluth to act as defendant's counsel.

Defendant contends that he was deprived of his liberty in violation of his rights to due process and to the safeguards of a criminal trial in that the finding that he was an alien guilty of conduct subjecting him to deportation does not require proof beyond reasonable doubt, but may be made on mere preponderance of evidence. In essence, defendant urges that the issue of the validity of the order of deportation must be tried in the criminal trial by the jury. Defendant finds support for this contention in Mr. Justice Jackson's dissenting opinion in *United States v. Spector*, 343 U.S. 169, 174. However, the concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal practice. The constitutional right to trial by jury does not include the right to have that body pass on the validity of an administrative order. *Cor v. United States*, 332 U.S. 442; *Estep v. United States*, 327 U.S. 114; *Yakus v. United States*, 321 U.S. 414. Although defendant is entitled to attack the validity of the order, *United States v. Heikkinen*, 7 Cir., 221 F. 2d 890, he has full protection by having the issue submitted to the trial judge and the reviewing courts as was done in the instant case. The case of *Wong Wing v. United States*, 163 U.S. 228, cited by defendant and relied upon by Mr. Justice Jackson in the *Spector* case is not in point. The Court held in that case that Congress could not "declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property. . . . unless provision were made that the fact of guilt should first be established by a judicial trial." 163 U.S. at p. 237. The question of guilt under Section 156(c) is resolved by a judicial trial with all its inherent safeguards. The indictment in the instant case charged defendant with willful failure to depart from the United States and willful

failure to make timely application in good faith for necessary travel documents, and the question whether defendant had committed the crimes thus charged was properly the only issue submitted to the jury.

Defendant also argues that the conviction herein, resting upon a previous determination in deportation proceedings, is obnoxious to due process of law for the added reason that the defendant was adjudged deportable in such proceeding by an immigration officer who was not fair and impartial, in that he performed both the function of judge and prosecutor. However, at the time the order in question was entered, the pertinent provisions of the Administrative Procedure Act, 5 U.S.C.A. § 1001 et seq., were not applicable to deportation proceedings. 8 U.S.C.A. § 155(a); *Belizara v. Zimmerman*, 3 Cir., 200 F. 2d 282.

Defendant contends that Section 156(c) imposed no affirmative duty upon him to effect his departure; that under this statute the only duties which rest with the alien are: (a) not to conceal his whereabouts after the final order of deportation has been entered, and (b) to present himself for deportation when requested to do so by the Attorney General. However, Section 156(c) defines four specific, different acts or omissions to act as constituting a crime: (1) willful failure or refusal to depart; (2) willful failure or refusal to make timely application in good faith for necessary travel documents; (3) connivance or conspiracy or any other action, designed to prevent or hamper the alien's departure, or with the purpose of so doing; and (4) willful failure or refusal of the alien to present himself for deportation as required by the Attorney General. Defendant's proposed construction of the Act would read out of the Act the crimes defined above in 1 and 2 (labeled for convenience). This we may not do. Defendant was charged with willful failure to perform certain enumerated acts. "Failure" is an omission to perform a duty or appointed function; and the duty in this instance was for defendant to make timely

application in good faith for the necessary travel documents and to depart from the United States within six months from the date of the order of deportation. The defendant performed neither of these duties. The fact that the Attorney General was under a duty to effect the defendant's departure from this country did not, of course, excuse the defendant from taking the steps which the Act expressly required of him. The trial court correctly instructed the jury that Section 156(c) imposes upon the alien "an affirmative duty and an obligation on his part to take specific steps towards effecting his own departure from the United States and to that end to make timely application for travel or other documents necessary to such departure." The scope and extent of the Attorney General's efforts, if any, to effect defendant's departure are immaterial to the question of whether defendant discharged the duties imposed upon him. Nor is it necessary that it be shown that there was a country available which would admit defendant. The choice of a country willing to receive defendant is left in the first instance to the defendant himself. *United States v. Spector*, 343 U. S. 169, 171. If defendant has made timely application in good faith for necessary travel documents which are refused because no country is willing to receive him, he has not violated Section 156(c). *United States v. Spector, supra*, at p. 172. But the defendant cannot claim as a defense the fact that no country will receive him unless he has discharged the duty imposed upon him of making timely application for the necessary travel documents. We do not now attempt to define "in good faith" as used in this portion of the Act because here the defendant did not make even a gesture towards effecting his departure.

Defendant next urges that Section 156(c), in so far as it imposed a penalty for an act that was committed before the statute was enacted, is void because it is an *ex post facto* law. The government apparently failed to perceive the purport of defendant's argument and merely answered

defendant by citing the principle that the *ex post facto* clause of the Constitution has no application to deportation proceedings. However, this phase of defendant's appeal is not an attack upon the deportation proceeding or the order of deportation that was subsequently entered against him, but upon the penal sanction that was imposed on him in a criminal proceeding—to which the *ex post facto* prohibition is obviously applicable. Nevertheless, defendant's contention must fail because he is not being punished for an act that was not punishable at the time it was committed, or being punished in addition to that then prescribed. Section 156(c) became effective September 23, 1950. The order directing defendant's deportation was entered on April 25, 1952, and defendant was indicted on November 10, 1953. Defendant's failure to act, here complained of, occurred subsequent to April 25, 1952, and therefore subsequent to the effective date of the Act. Thus, the criminal acts for which defendant was convicted were committed subsequent to the effective date of Section 156(c), and that section clearly informed the defendant that his failure to act as here charged would be punishable as prescribed by the Act. Nor does Section 156(c) add a new punishment to that before prescribed. Defendant insists that he was not warned that under some future statute his wrongful conduct, *i.e.*, communist activities or affiliations, would subject him to a penalty in addition to deportation if, when ordered deported, he should fail or refuse to depart from this country. However, in this cause defendant is not being punished for his alleged communist activities or affiliations, but for his willful failure to make timely application for necessary travel documents and to depart from the United States. Defendant's conduct which subjected him to deportation occurred prior to the effective date of Section 156(c), but the penalty is imposed for acts committed subsequent to the Act of September 23, 1950, which is a new and isolated enactment that relates to the antecedent deportable conduct only in the sense that such conduct was necessary to a

valid order of deportation which, in turn, is a prerequisite to a conviction under Section 156(e).

Defendant urges that the indictment herein is fatally defective under the statute because it failed to allege: (1) knowledge by defendant of the entry of the order of deportation and of the contents thereof; (2) the defendant's freedom to depart from this country, and the willingness of some foreign country to admit him into its territory; (3) by what authority, or upon or pursuant to what hearing, if any, an order of deportation was issued, and whether such hearing, if any, accorded him due process; (4) the country to which defendant was ordered deported; (5) the country of origin of the defendant or the country of which he is, or last was, a citizen. Items 2, 4 and 5 are necessary allegations only under defendant's erroneous interpretation of Section 156(e) which has already been disposed of. Item 1 is properly an evidentiary matter relegated to the trial and, in any event, an indictment which substantially follows the wording of a statutory crime, as was the case here, is sufficient, *Jelke v. United States*, 7 Cir., 255 Fed. 264, and the indictment clearly informed defendant of the charge against him in such a manner that he could prepare his defense. Although defendant is entitled to attack the validity of the deportation order, it is not necessary for the indictment to allege that defendant was accorded due process of law before the administrative tribunal nor pursuant to what authority or hearing the order was issued. None of these elements are part of the crime with which defendant was charged.

Finally, the concurring opinion of Judge Major, joined in by Judge Schnackenberg, in *United States v. Heikkinen*, 7 Cir., 221 F. 2d 890, 893, which involve the same indictment as that in the instant case, stated, at p. 893:

"Nothing was placed in issue by defendant's motion to dismiss the indictment other than the legal question as to whether an offense was charged under the terms of the statute. If not, defendant was entitled to have

the charge dismissed and that would have ended the matter. I think, however, that the indictment stated a good cause of action and that the motion to dismiss was properly denied."

We have made an examination of the record before us and find that it contains substantial proof to support the verdict of the jury,

The judgment is AFFIRMED.

A true Copy:

Teste:

.....
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois
Thursday, January 17, 1957

BEFORE:

HON. F. RYAN DUFFY, *Chief Judge*
HON. PHILIP J. FINNEGAN, *Circuit Judge*
HON. H. NATHAN SWAIM, *Circuit Judge*

No. 11,709

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

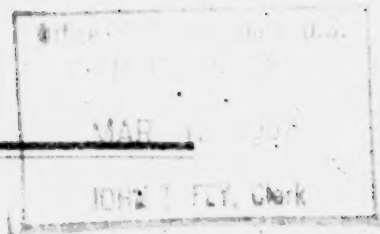
v.

KNUT EINAR HEIKKINEN, *Defendant-Appellant*.

Appeal from the United States District Court for the
Western District of Wisconsin

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, **AFFIRMED.**



IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~811~~ 89

KNUD EINAR HEIKKINEN, *Petitioner*,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

No.

KNUT EINAR HEIKKINEN, *Petitioner*,

v.

UNITED STATES OF AMERICA.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH
CIRCUIT**

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit which affirmed a judgment of the United States District Court for the Western District of Wisconsin convicting petitioner of violating Section 20(c) of the Immigration Act of 1917, as amended, 64 Stat. 1010 (1950).

OPINION BELOW

The opinion of the court below has not yet been reported. It is reproduced in the Appendix hereto.

JURISDICTION .

The judgment of the Court of Appeals was entered on January 17, 1957 (Appendix, *infra*), and a petition for rehearing was denied on February 4, 1957. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the "self-deportation" statute (section 20(c) of the Immigration Act of 1917, added by section 23 of the Internal Security Act of 1950, 64 Stat. 1010), is unconstitutional on its face or as applied in this case.

2. Whether the crime of willful failure to depart may be committed before travel documents have been obtained by reason of a failure to apply for travel documents.

3. Whether the trial court's instructions erroneously eliminated the necessity for proof of willfulness and criminal intent.

4. Whether the statute applies to persons ordered deported under the provisions added to the Immigration Act of October 16, 1918 by the Internal Security Act of 1950.

5. Whether the petitioner was convicted under an erroneous construction and application of the statute.

6. Whether the conviction is supported by the evidence.

7. Whether the petitioner was properly convicted, when the sole evidence against him consisted of an uncorroborated confession.

8. Whether the trial court abused his discretion in refusing to suspend sentence in accordance with the provisions and standards laid down in the statute.

STATUTES INVOLVED

Section 23 of the Internal Security Act of 1950, 64 Stat. 1010, amended the Immigration Act of February 5, 1917 to add section 20(c), as follows:

"Any alien against whom an order of deportation is outstanding under (1) the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 8 U.S.C. 137); (2) the Act of February 9, 1909 as amended (35 Stat. 614, 42 Stat. 596; 21 U.S.C. 171, 174-175); the Act of February 18, 1931, as amended (46 Stat. 1171, 54 Stat. 673, 8 U.S.C. 156a; or (4) so much of section 19 of the Immigration Act of 1917, as amended (39 Stat. 889-890; 54 Stat. 671-673, 56 Stat. 1044; 8 U.S.C. 155) as relates to criminals, prostitutes, procurers, or other immoral persons, anarchists, subversives and similar classes, who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of the Subversive Activities Control Act of 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: Provided, That this subsection shall not make it illegal for any

alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: Provided further, That the court may for good cause suspend the sentence of such alien and order his release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify releasing the alien, the court shall take into account such factors as (1) the age, health, and period of detention of the alien; (2) the effect upon the national security and public peace or safety; (3) the likelihood of the alien's following a course of conduct which made or would make him deportable; (4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States; (5) the reason for the inability of the Government of the United States to secure passports, other travel documents, or deportation facilities from the country or countries to which the alien has been ordered deported; and (6) the eligibility of the alien for discretionary relief under the immigration laws."

Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008 amended section 1 of the Immigration Act of October 16, 1918, to provide in part as follows:

"That any alien who is a member of any one of the following classes shall be excluded from admission into the United States.

* * * *

¹The statute, with some revisions, was carried forward in section 242(e) of the Immigration and Nationality Act of 1952, 8 U. S. C. Sec. 1252(e).

(2) Aliens who, at any time, shall be or shall have been members of the following classes:

* * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt . . .

The aforesaid Section 22 amended Section 4 of the Immigration Act of October 16, 1918, to provide in part:

"(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."²

² These provisions were repealed by Section 403 (a) (16) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 279. The 1952 Act recodified and reenacted those provisions without material change. See Section 241(a) (6) (C), 66 Stat. 204, 8 U. S. C. 1251(a) (6) (C).

STATEMENT OF THE CASE

The petitioner was convicted on both counts of a two-count indictment (R. 179-181). The indictment alleged that he had been ordered deported on April 9, 1952, on the ground of membership in the Communist Party after entry. The first count charged him with willfully failing to depart from the United States during the six months period beginning April 9, 1952. The second count charged that during that same period the petitioner "did willfully fail to make timely application in good faith for travel or other documents necessary to his departure from the United States." (R. 1-2).

The petitioner is an alien, a native of Finland, who was first admitted into the United States for permanent residence in 1916, and whose last entry into the United States was in 1935. He has resided in the United States since that date.³ After several proceedings before the Immigration and Naturalization Service, the Board of Immigration Appeals on April 9, 1952, affirmed an order of deportation against the petitioner on a finding that he had been a member of the Communist Party from about 1922 to 1930,⁴ and

³ See pp. 7-17 of the transcript of a hearing on a petition for habeas corpus in the United States District Court for the District of Minnesota Fifth Division, November 10, 1950, introduced as Exhibit 11 of the deportation hearing which was introduced as Exhibit 1 at the trial.

⁴ The opinion below states that the petitioner was a member of the Communist Party in 1932, 1947, and 1948 (App. 2a). There was evidence to that effect in the deportation hearing, but the Board of Immigration Appeals, which is the final adjudicating body in the Service, limited its findings of Communist Party membership to the period 1922 to 1930.

was therefore deportable under the Internal Security Act of 1950, amending the Immigration Act of October 16, 1918 (see decision of Board of Immigration Appeals, Exhibit No. 1).⁵

On or about April 18, 1952, Mr. Maki, a representative of the Service called upon petitioner and interviewed him for the purpose of filling out a Service form headed "Passport Data for Alien Deportees" (Exhibit 9, R. 127). This was the form utilized by the Service to obtain the personal history of a deportee ~~in order to enable the Service to obtain the personal history of a deportee~~ in order to enable the Service to procure, in accordance with its usual practice, the necessary travel documents for the alien (R. 82, 89, 128, 132, 138-41). Petitioner was told by Maki that the information was required for the purpose of "somebody in the Government possibly obtaining travel documents for him" (R. 138, 144-5). The petitioner fully cooperated and gave all the necessary information (R. 137). The form was duly forwarded to the Chicago office of the Service for processing (R. 89, 102, 127, 128, 138). The trial court ruled ^{out} all efforts of petitioner to learn what was done with this form or what steps were taken by the government to obtain travel documents for the deportation of the petitioner (R. 19-21), on the ground that the government owed the petitioner "no duty" (R. 19).

On April 30, 1952, the Officer-In-Charge of the Duluth, Minnesota, office of the Service wrote to the

⁵ The order of deportation was also based upon a finding that the petitioner had last entered the United States without a valid immigration visa. This ground is not involved here since it is not one of the grounds for deportation to which the criminal statute applies.

petitioner on a mimeographed form as follows (emphasis added):

"Dear Sir:

"An order, of which you have been notified, directing your deportation from the United States was entered on April 25, 1952,⁶ on the following grounds:

"The Immigration Act of May 26, 1924, in that at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder; and

"The Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States."

"Arrangements to effect your deportation pursuant to such order are being made and when completed, you will be notified when and where to present yourself for deportation."

"In this connection you are reminded that Section 23 of the Internal Security Act of 1950, which was enacted by Congress on September 23, 1950, declares that any such alien 'who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of' that Act 'whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to

⁶ This was the date on the formal warrant for deportation. The actual date of the order for deportation was April 9, 1952, the date of the decision by the Board of Immigration Appeals (R. 112).

prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony. Provided, That this subsection shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody:
* * *

"Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950." (Exhibit 6, R. 74-75.)

On February 12, 1953, petitioner was interviewed by officials of the Service and gave them a sworn statement. This statement (Exhibit 8) was the sole evidence introduced by the government to show that petitioner had failed to depart or make timely application for travel documents.

In this statement, petitioner said that he had informed his attorney of the visit from Mr. Maki and of his understanding as a result of that interview "that whenever I have to personally start to do something to get a passport I will be officially informed," and that his attorney replied that petitioner should wait "until you get official information from the immigration authorities." (R. 102-3). The statement continued as follows (R. 103-105):

Q. Since receipt of the letter on Form I-229 dated April 30, 1952, did you depart from the United States in the required six months period thereafter?

A. No.

Q. Have you departed from the United States at any time since April 30, 1952?

A. No, I have just been waiting for instructions from the immigration authorities.

Q. But you had already been given appropriate instructions in writing in the letter of April 30, 1952. What made you believe you would get any other instructions relative to your departure from the United States?

A. The discussion with Mr. Maki at our office gave me the impression that he will write to the officials in Canada and Finland and in case he will not succeed, then he will inform that I will have to do it myself.

Q. Didn't Mr. Maki of the Duluth immigration office merely interview you at that time to execute an immigration form with which the Immigration and Naturalization Service was proceeding independently of any efforts of yourself, to deport you from the United States?

A. No, this was not the understanding. Mr. Maki told me at first he will write to Canada and find out whether they will accept me because my last citizenship was Canadian. Mr. Maki stated that apparently it would take about two months to get the official answer from there. Then he stated he has start to a correspondence with the Consul General of Finland in New York and if he does not succeed to get an affirmative answer then it will befall upon me to apply personally, to make an application for a visa to Finland. That was the essence—we had a lengthy discussion.

Q. Did not Mr. Maki call your attention at the time of that interview with you, that you would have to proceed independently and simultaneously to apply for a passport with which to leave the

United States within the six months period of time commencing April 25, 1952?

A. At least I did not understand so.

Q. At your deportation hearing, what country did you specify to which you should be deported if you were ordered deported from the United States?

A. To my native country, Finland.

Q. During the six months period commencing April 25, 1952, did you make any effort to obtain a passport or other travel document with which to enter Finland or any other country?

A. No because I was waiting for word from the immigration office.

Q. Have you made any effort to secure a passport or other travel document with which to depart from the United States at any time since April 30, 1952?

A. No, because of the reasons that I have stated.

Q. Since the order of deportation was entered against you on April 25, 1952, did you receive any request from the Immigration and Naturalization Service to execute any passport application other than the interview with Mr. Maki of this office some time last summer when he apparently merely filled out an immigration form with which to present your case for issuance of travel documents to enter either Canada or Finland?

A. No, and in fact I have been wondering about that myself.

Q. Did you wilfully refuse to depart from the United States within the six months period commencing on April 25, 1952, as required by the law?

A. No.

Q. Did you wilfully fail to depart from the United States within the six months period commencing on April 25, 1952, as was required of you by law?

A. By no means, no.

Q. Did you wilfully refuse to apply in good faith during the required period of time in your

case, for a passport or other travel document which you could depart from the United States by October 25, 1952?

A. No.

Q. Why did you fail to make timely application for a passport and to depart from the United States by October 25, 1952 as required by law in your case?

A. Just because I was waiting for instructions from Mr. Maki as to when I should start to make application for a passport. In case the Service had failed to get a visa or passport.

The petitioner further stated that he wanted to cooperate with the Attorney General to secure a passport for Finland, but that if the Attorney General wished him to depart to some other country, he would wish to consult with his attorney before stating his position (R. 105).

A prior conviction of the petitioner upon the same indictment had been reversed by the Seventh Circuit on the ground that the trial court had not considered the validity of the underlying deportation order. *United States v. Heikkinen*, 221 F. 2d 890. Upon the retrial, the record of the deportation hearings were introduced into evidence (Exh. 1). The trial judge reviewed that record and held that the evidence therein supported the findings of the immigration officials and that the deportation order was valid (R. 47). He ruled that the validity of the order should not be submitted to the jury (R. 56-64), and he instructed the jury that the deportation order had been validly entered after a hearing in which the petitioner had been accorded due process of law (R. 166-167).

The trial court rejected the following instructions requested by the petitioner: (1) "The mere presence

in this country of an alien is not evidence of guilt" (R. 157), and (2) "The mere failure to depart from this country within six months, or to make timely application for travel document, is not a violation of the law. There must be a wilful failure and refusal to depart within six months or to make timely application for travel document." (R. 158).

He instructed the jury as follows as to the interpretation and meaning of the statute (R. 166-8):

"The law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can be neither justified nor excused on the ground of innocent intent.

* * * * *

"You are instructed that the statute on which this indictment is laid . . . places upon an alien against whom an order of deportation is outstanding, an affirmative duty and an obligation on his part to take specific steps toward effecting his own departure from the United States, and to that end to make timely application for travel or other documents necessary to such departure. It is the alien's willful failure in that regard to fulfill such duty and obligation that is the gist of the offenses here charged.

"'Willful' as used in this statute, means an intentional failure and refusal to comply with the order of deportation.

"There is no duty on the part of the Government to assist the defendant in effecting his departure. The Government will, if requested, assist him. But the duty devolves upon the defendant to comply with that order of deportation.

"As I say, the material parts of the statute I have read to you place upon an alien against whom

an order of deportation is outstanding, an affirmative duty or obligation on his part to take specific steps toward effecting his own departure from the United States. In other words, he can't remain idle. He must take the necessary steps to effect his departure from this country within that period of six months. And if he fails to do so, he has violated the law and the statute involved in this case.

The petitioner was convicted on both counts. He was sentenced to a five year prison term on the first count. Imposition of the sentence on the second count was deferred by the trial judge "until I determine whether or not he has made an honest application and an effort to leave this country and to comply with that order" (R. 175).

REASONS FOR GRANTING THE WRIT

This is the first conviction under the "self-deportation" statute, first enacted by the Internal Security Act of 1950 and carried forward into the current Immigration and Nationality Act. It raises major and novel questions regarding the constitutionality and application of the act which have, we believe, been erroneously decided below.

1. Constitutionality

United States v. Spector, 343 U.S. 169, recognizes the substantial nature of the question as to constitutionality of the statute on its face. There was no conviction in *Spector*, the case coming to this Court on appeal from a District Court order dismissing an indictment under the statute. *Spector* did not involve the clause on which petitioner was sentenced (willful failure to depart), but involved only the clause (will-

ful failure to apply for travel documents) on which petitioner was convicted but sentence was deferred. In *Spector*, a divided Court held solely that the latter clause was not invalid for vagueness. The majority opinion refused to consider whether the statute was unconstitutional for reasons other than vagueness, since such reasons had not been raised or briefed, and it preferred to defer passing on them "until a stage has been reached where the decision of the precise constitutional issue is necessary" (at 172). The majority added (at 172): "It will be time to consider whether the validity of the order of deportation may be tried in the criminal trial either by the court or by the jury . . . when and if the appellee seeks to have it tried. That question is not foreclosed by this opinion. We reserve decision on it."

Justices Black, Frankfurter and Jackson dissented. Justices Frankfurter and Jackson did so in an opinion written by the latter on the ground, not reached by the majority, that the statute was invalid on its face because it denied an accused trial by jury and other constitutional safeguards by removing from determination in the criminal proceeding an issue indispensable to guilt, namely, whether the accused was in fact deportable.⁷ Justice Jackson's opinion pointed out (at 178-9):

⁷ Justice Jackson's opinion points out (at 178-9) that the statute deprives the accused of the following safeguards with regard to the issue of whether he is deportable: trial by jury, requirement of proof beyond a reasonable doubt, statute of limitations. To these may be added: the benefits of the ex post facto and bill of attainder clauses, the rule prohibiting conviction on uncorroborated confessions (see *infra*, p. 22), the judicial rules of evidence, such as the hearsay rule, *U. S. ex rel Bilokumsky v. Tod*, 263 U. S. 149; *U. S. ex rel Tisi v. Tod*, 264 U. S. 133; *U. S. ex rel Vajtauer v. Commis-*

"Administrative determinations of liability to deportation have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations. . . . By this Act a deportation order is made to carry potential criminal consequences."

Justice Black dissented on the ground that the statute was unconstitutionally vague, but he added: "I have not yet seen a satisfactory reason for rejecting [Justice Jackson's] view" (at 174, fn. 2).

In this case the constitutional questions which both the majority and minority considered serious in *Spector* are obviously ripe for review by this Court. There has been a conviction under the statute. The court below passed on, and disagreed with, the constitutional objections set out in Justice Jackson's opinion. The "stage has been reached where the decision of the precise constitutional issue is necessary."

The doubt as to the validity of the statute is magnified because of the specific ground of deportability involved. The statute does not apply to all deportees, but only to those ordered deported for certain causes. Thus a necessary element of the crime is the cause for deportation. In petitioner's case, this cause was his alleged past membership in the Communist Party as provided in the Internal Security Act of 1950.⁸ This

sioner, 273 U. S. 103; the principle that failure to testify is not evidence of guilt *U. S. ex rel Bilokumsky v. Tod*, *supra*; *U. S. ex rel Vajtlauer v. Commissioner*, *supra*, and the right under Rule 44 of the Federal Rules of Criminal Procedure to have counsel assigned. Petitioner was not represented by counsel in the deportation hearing.

⁸ See *infra* p. 18, for our discussion of the question as to whether the statute covers this ground for deportation.

statute was sustained against objections of lack of due process and violation of the ex post facto and bill of attainder clauses, on the ground that deportation is not a criminal proceeding and does not inflict punishment. *Galvan v. Press*, 347 U.S. 522; cf. *Harisiades v. Shaughnessy*, 342 U.S. 580. Yet here an administrative decision of deportability made under that statute has resulted in punishment by a five-year prison sentence, with another sentence in the offing.

Furthermore, at this writing, this Court is reconsidering the constitutionality of the Communist-deportation statute and is determining whether *Galvan* should be overruled. *Rowoldt v. Perfetto*, No. 34 this Term.

2. Relationship of the Two Offenses

The statute penalizes both a willful failure to depart and a willful failure to make timely application for travel documents. Congress obviously meant these to be separate offenses to cover different contingencies. The failure-to-depart crime can be committed only after travel documents have been obtained, whether by the alien or the Service. A failure to apply for travel documents can not by itself constitute a failure to depart.

Here, however, the two statutory crimes were made identical. The record is clear that travel documents had not been obtained. The petitioner, therefore, could not have committed the crime of failure to depart, alleged in the first count. Yet he was convicted on that count.⁹ Furthermore, the trial court's in-

⁹ Since the petitioner was sentenced only on the first count, and not on the second (R. 175), a reversal of the conviction on the first count requires a reversal of the judgment below.

structions to the jury made the two crimes the same. He told the jury that the statute "places upon an alien against whom an order of deportation is outstanding, an affirmative duty and an obligation on his part to take specific steps toward effecting his own departure from the United States, and to that end to make timely application for travel or other documents necessary to such departure. It is the alien's willful failure in that regard to fulfill such duty and obligation that is the gist of the offenses here charged" (R. 167-8). This permitted the jury to find a willful failure to depart solely from the failure to apply for travel documents. The trial court thus erroneously applied the statute so as to multiply penalties for one action (cf. *Prince v. United States*, decided Feb. 25, 1957, 25 U. S. Law Week 4182).

Certiorari should be granted, therefore, so that this Court can establish whether the two offenses created by the statute are one for the purposes of proof but two for the purposes of punishment, and whether the offense of willful failure to depart can be committed before receipt of travel documents.

3. Applicability of Statute

Petitioner was ordered deported under provisions added to the Immigration Act of October 16, 1918, by section 22 of the Internal Security Act of 1950, 64 Stat. 1010. The statute under which he was convicted is applicable to, "Any alien against whom an order of deportation is outstanding under (1) the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 8 U.S.C. 137). . . ." Prior to the amendment by 64 Stat. 1010, neither the original Act of October 16, 1918 nor the cited amendments, pro-

vided for deportation for membership in the Communist Party. An important and novel question is raised whether the statute applies to an alien against whom an order of deportation was entered for a cause provided by an amendment other than those listed in the statute.

4. Willfulness and Intent

The trial court instructed the jury: "'Willful,' as used in this statute, means an intentional failure and refusal to comply with the order of deportation" (R. 168). "The law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can be neither justified nor excused on the ground of innocent intent" (R. 166). A deportee has "an affirmative duty or obligation" to "take specific steps toward effecting his own departure . . . he can't remain idle. He must take the necessary steps to effect his departure from this country within that period of six months. And if he fails to do so, he has violated the law and the statute involved in this case." (R. 168).

In combination, these instructions directed the jury to convict petitioner on a finding of nothing more than inaction, and without the need of either willfulness or intent. Congress, however, meant "willful" to be a meaningful and substantial element of the crime. The bill as originally reported to the Senate did not include the element of willfulness, and this omission was rectified by the Senate Judiciary Committee before presenting the bill in the form in which it was enacted. The Committee stated (Sen. Rep. 2369, 81st Cong., 2d Sess., to accompany S. 4037, at pp. 14-15):

"As previously reported to the Senate by the Committee on the Judiciary, H. R. 10 makes it a

felony for any alien in the subversive, criminal or immoral classes against whom an order of deportation has been entered to remain in the United States after 6 months from the date of entry of such order of deportation. Section 23 of the bill modifies this penalty by including an element of willfulness."

Furthermore, the trial court's definition of "willful" is contrary to the holdings of this Court that the term in a criminal statute requires a bad purpose and a specific intent to violate the statute. *Fellon v. United States*, 96 U.S. 699; *Sprerr v. United States*, 174 U.S. 728; *United States v. Murdock*, 290 U.S. 389; *Spies v. United States*, 317 U.S. 492; *Screws v. United States*, 325 U.S. 91; *Hartzel v. United States*, 322 U.S. 680. Even if the statute had not contained the word "willful," the trial court's instructions would have been incorrect as permitting conviction without a finding of actual criminal intent. *Morissette v. United States*, 342 U.S. 246.

The erroneous instructions were particularly prejudicial because of the absence of evidence of willfulness on the part of petitioner. In fact, the trial court should have entered a judgment of acquittal because mens rea was not proved. *Hartzel v. United States*, *supra*. The petitioner, it is true, did not apply for travel documents. But, according to his testimony, he did not do so because he understood that the Immigration Service was procuring the documents for him, as indeed is its usual practice. His testimony had solid corroboration in the facts that (1) an officer of the Service had interviewed him and obtained from him the information for a Service form designed for the Service's procurement of travel documents, and

(2) the notice of deportation sent to him by the Service recited: "Arrangements to effect your deportation pursuant to such order are being made and when completed you will be notified when and where to present yourself for deportation."

The trial court's instructions (especially when coupled with the admonition to the jury (R. 168) that, "There is no duty on the part of the Government to assist the defendant in effecting his departure") made this evidence meaningless, even though it was obviously crucial to willfulness and intent. Furthermore, there was no possible justification for the trial court's refusal to permit petitioner to ascertain what the Service had done with the form for obtaining passports and what steps it had taken to procure travel documents. For all that appears, the Service may have discovered that travel documents could not be obtained, in which event the prosecution of petitioner for failing to take a useless action would indeed be shameful and offensive to due process. The situation would be even worse if the Service had in fact obtained the necessary travel documents, but was withholding them from petitioner in order to make a prosecution.

Certiorari should be granted so that the Court may decide whether willfulness has any real meaning in the statute, whether a specific intent is required, whether it is permissible to pounce upon an alien because he has been lulled into inaction by the Service's informing him that it is making arrangements for his deportation, and whether an alien may be convicted for not applying for travel documents which are non-obtainable or have already been obtained by the Service.

5. Conviction on an Uncorroborated "Confession"

The sole evidence to support the conviction was petitioner's written statement to the Immigration Service. In our view this statement was exculpatory, since it expressed a good faith reason for the failure to apply for travel documents. Under the judge's instructions, the statement was a confession, since good faith was irrelevant and the only question was whether an application had been made.

Even under the trial court's view the conviction can not be sustained. There being no evidence of guilt other than this "confession," the judgment below violates the rule that an uncorroborated confession will not support a conviction in the federal courts. *Isaacs v. United States*, 159 U.S. 487; *Opper v. United States*, 348 U.S. 84; *Smith v. United States*, 348 U.S. 147; *United States v. Calderon*, 348 U.S. 160; cf. *Warszower v. United States*, 312 U.S. 324; see Annotation, 99 L. ed. 110.

6. The Sentence

The statute here is unique in providing detailed standards for the trial court to determine whether sentence should be suspended. Under the circumstances of this case, these standards, if applied, obviously called for a suspended sentence conditioned on the petitioner's making application for travel documents. The petitioner is aged (first standard); his failure to depart had no effect upon the national security and public peace or safety (second standard), there was no likelihood of his repeating the conduct which made him deportable (third standard), and he had cooperated with the Immigration Service in the procurement of travel documents and was willing to make

further efforts to obtain such documents (fourth standard). The fifth and sixth standards have no applicability to this case in either direction.

The trial court, however, imposed a savage sentence of five years, and reserved the right to add another sentence. He failed to take the statute's suspension provisions into account, and he violated the statute's policy of mercy.

Because of the unique nature of the statute, a substantial question is presented as to whether it is outside the usual rule that sentences may not be reviewed if within statutory limits. We believe that in order to effectuate the statutory policy the Court should review the trial court's failure to suspend the sentence as representing a failure to exercise discretion or an abuse of discretion. This would leave the scope of review short of that applied in contempt cases. *United States v. United Mine Workers of America*, 330 U.S. 258.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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"Dear Sir:

"An order, of which you have been notified, directing your deportation from the United States was entered on April 25, 1952,⁶ on the following grounds:

"The Immigration Act of May 26, 1924, in that at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder; and

"The Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States."

"Arrangements to effect your deportation pursuant to such order are being made and when completed you will be notified when and where to present yourself for deportation."

"In this connection you are reminded that Section 23 of the Internal Security Act of 1950, which was enacted by Congress on September 23, 1950 declares that any such alien 'who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of' that Act 'whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the

⁶ This was in fact the date of the formal warrant for deportation and not of any deportation order (R. 112).

Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony. Provided, That this subsection shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: * * *

"Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950." (Exhibit 6, R. 74-75).

On February 12, 1953, petitioner was interviewed by officials of the Service and gave them a sworn statement (R. 94-5). Petitioner did not have counsel present at the time of this interview, nor was he advised of his right to have counsel (R. 96). This statement (Exh. 8, R. 98-107), was the sole evidence introduced by the government to show that petitioner had failed to depart or make timely application for travel documents.

In this statement, petitioner said that he had informed his attorney of the visit from Mr. Maki and of his understanding as a result of that interview "that whenever I have to personally start to do something to get a passport I will be officially informed"; and that his attorney replied that petitioner should wait "until you get official information from the immigration authorities" (R. 102-3). The statement continued as follows (R. 103-5):

"Q. Since receipt of the letter on Form I-229 dated April 30, 1952, did you depart from the

United States in the required six months period thereafter?

A. No.

Q. Have you departed from the United States at any time since April 30, 1952?

A. No, I have just been waiting for instructions from the immigration authorities.

Q. But you had already been given appropriate instructions in writing in the letter of April 30, 1952. What made you believe you would get any other instructions relative to your departure from the United States?

A. The discussion with Mr. Maki at our office gave me the impression that he will write to the officials in Canada and Finland and in case he will not succeed, then he will inform that I will have to do it myself.

Q. Didn't Mr. Maki of the Duluth immigration office merely interview you at that time to execute an immigration form with which the Immigration and Naturalization Service was proceeding independently of any efforts of yourself, to deport you from the United States?

A. No, this was not the understanding. Mr. Maki told me at first he will write to Canada and find out whether they will accept me because my last citizenship was Canadian. Mr. Maki stated that apparently it would take about two months to get the official answer from there. Then he stated he has start to a correspondence with the Consul General of Finland in New York and if he does not succeed to get an affirmative answer then it will befall upon me to apply personally, to make an application for a visa to Finland. That was the essence—we had a lengthy discussion.

Q. Did not Mr. Maki call your attention at the time of that interview with you, that you would have to proceed independently and simultaneously to apply for a passport with which to leave the United States within the six months period of time commencing April 25, 1952?

A. At least I did not understand so.

Q. At your deportation hearing, what country did you specify to which you should be deported if you were ordered deported from the United States?

A. To my native country, Finland.

Q. During the six months period commencing April 25, 1952, did you make any effort to obtain a passport or other travel document with which to enter Finland or any other country?

A. No, because I was waiting for word from the immigration office.

Q. Have you made any effort to secure a passport or other travel document with which to depart from the United States at any time since April 30, 1952?

A. No, because of the reasons that I have stated.

Q. Since the order of deportation was entered against you on April 25, 1952, did you receive any request from the Immigration and Naturalization Service to execute any passport application other than the interview with Mr. Maki of this office some time last summer when he apparently merely filled out an immigration form with which to present your case for issuance of travel documents to enter either Canada or Finland?

A. No, and in fact I have been wondering about that myself.

Q. Did you wilfully refuse to depart from the United States within the six months period commencing on April 25, 1952, as required by the law?

A. No.

Did you wilfully fail to depart from the United States within the six months period commencing on April 25, 1952, as was required of you by law?

A. By no means, no.

Q. Did you wilfully refuse to apply, in good faith during the required period of time in your case, for a passport or other travel document which you could depart from the United States by October 25, 1952?

A. No.

Q. Why did you fail to make timely application for a passport and to depart from the United States by October 25, 1952 as required by law in your case?

A. Just because I was waiting for instructions from Mr. Maki as to when I should start to make application for a passport. In case the Service had failed to get a visa or passport."

The petitioner further stated that he wanted to cooperate with the Attorney General to secure a passport for Finland, but that if the Attorney General wished him to depart to some other country, he would wish to consult with his attorney before stating his position (R. 105).

Mr. Maki testified for the government that he could not recall the details of his interview with the petitioner on or about April 18, 1952 (R. 134). He denied, however, that he had specifically told the petitioner that he need do nothing to obtain travel documents until he received notice from the Service (R. 131). He acknowledged that he did inform the petitioner that the purpose of his visit was to obtain information which would be forwarded to the Chicago office of the Service so that it might take the necessary steps to obtain travel documents (R. 128, 138, 144-5). Maki acknowledged that he did not know whether the petitioner could have obtained travel documents by any other channels or whether it was necessary for him to proceed through the Service (R. 146). This latter testimony thus corroborated petitioner's sworn statement (R. 103-4) that Maki did not inform him that he had to proceed independently of the Service to apply for travel documents.

A prior conviction of the petitioner upon the same indictment had been reversed by the Seventh Circuit on the ground that the trial court had not considered the validity of the underlying deportation order. *United States v. Heikkinen*, 221 F. 2d 890. Upon the retrial, the record of the deportation hearings (Exh. 1) was introduced into evidence (R. 36). The trial judge reviewed that record and held that the evidence therein supported the findings of the immigration officials and that the deportation order was valid (R. 47). He ruled that the validity of the order should not be submitted to the jury (R. 56-64), and he instructed the jury that the deportation order had been validly entered after a hearing in which the petitioner had been accorded due process of law (R. 166-7).

The petitioner was convicted on both counts of the indictment (R. 172).

After the petitioner had been indicted in the present proceedings he did in fact secure travel documents to return to Finland. He was prevented from departing to Finland, however, by his indictment and the necessity of his remaining in this country to stand trial. At the time of sentencing, petitioner's counsel indicated that petitioner was anxious to have an opportunity to apply again for travel documents to Finland so that he could depart to Finland. Accordingly, his trial counsel requested that sentence be suspended at least long enough to give him that opportunity. (R. 174.) The trial court rejected this request. Instead, he sentenced the petitioner to a five year prison term on the first count. Imposition of sentence on the second count was deferred by the trial court until completion of the sentence on count one and "until I determine

whether or not he has made an honest application and an effort to leave this country and to comply with that order." (R. 175.)

SUMMARY OF ARGUMENT

I.

A. Petitioner together with an official of the Immigration Service filled out the Service form, "Passport Data for Alien Deportees," in order to enable the Service to obtain travel documents in accordance with its usual practice. Since the form was designed to be used for obtaining travel documents, petitioner, by causing it to be completed, thereby obviously made an application for travel documents. There is no evidence that any other step was necessary or useful to secure travel documents.

The thesis of the government is that the petitioner was delinquent because he failed to make an application directly to Finland. But there is no evidence that Finland required (or even accepted) direct applications and that it did not recognize applications channelled through the Service. Moreover, the government introduced no evidence as to what petitioner was required to do to make a proper application for travel documents. Hence, petitioner was convicted for failing to take some utterly undefined action which was not shown to be either necessary, useful or appropriate for the obtaining of travel documents. The petitioner completed the only application form he was asked to complete and which was necessary for obtaining travel documents. He therefore did not fail to apply for travel documents.

B. Petitioner was convicted of a failure to depart on evidence and under instructions which authorized a conviction of this crime solely on proof of a failure to apply for travel documents. But since the statute has another specific provision punishing the latter failure, the failure-to-depart clause must be construed to apply only to aliens who fail to depart after travel documents have been obtained or if travel documents are unnecessary.

This limiting construction is impelled by the principles that penal statutes must be strictly construed, that a cumulation of offenses for the same transaction is not favored, and that a general provision will normally not be construed to include specific prohibitions in the same enactment. The government's reading of the statute conflicts with the prohibition against double jeopardy, since it makes two offenses out of the identical conduct of willful failure to apply for travel documents.

C. Since the crimes involved are *willful* failures, it was necessary for the government to prove that the omissions were done with specific intent and with the purpose of disobeying or disregarding the law. The evidence in this case negates willfulness.

Petitioner explained his failure to take action on the ground that he had obtained the impression from his interview with Maki that he need do nothing further until he heard from the Service. This statement is exculpatory, there was no conflicting evidence, and petitioner's assertion of good faith is corroborated by Maki's testimony and by the Service's letter of April 30.

If the Service actually wished petitioner to make direct application to Finland for travel documents on his own, it should have told him so. It did not do so. Instead, it affirmatively induced petitioner to believe that he need take no further action, and then pounced on him for the inaction it had induced.

II

A. The chief factual issue before the jury was whether petitioner's failure to take any action subsequent to his interview with Maki, was due to his honest belief that the matter was in the hands of the government, or whether this failure was with knowledge by petitioner that he was obliged to take independent action. The trial court failed to instruct the jury on the issue.

B. The trial court's instructions authorized the jury to convict even if petitioner's failures were done innocently and in good faith. Thereby the court erroneously eliminated the requirement, arising from the statutory term "wilful", that the failures had to be committed with specific intent and for the purpose of disobeying and disregarding the law.

This elimination of criminal intent was aggravated by the further instruction to the jury that there was no duty on the part of the government to assist the petitioner in effecting his departure, and that there was an affirmative duty on the part of the petitioner to obtain travel documents. Under this view, the petitioner was guilty even if his failure to take action was a result of his good faith reliance upon the belief that the government was taking the necessary steps and would inform him if it desired further action on his part.

III

The trial court's fallacious view that the issue in the case was one of petitioner's duty as against the government's duty also caused him to err in refusing to grant the petitioner access to the records of the Service to determine what efforts the Service had made to secure travel documents and what success had attended such efforts. This ruling was tantamount to holding that the Service was entitled to act in bad faith and that petitioner could be convicted for failing to apply for documents which, for all that appears, had been obtained or were impossible to obtain.

IV

The sole evidence to support the conviction was petitioner's statement to the Service, given as the result of an interview which took place without benefit of counsel. There being no evidence of guilt other than this statement, the judgment below violates the rule that an uncorroborated confession will not support a conviction in the federal courts.

V

The statute here is unique in its specific provision for suspension of sentence and its listing of detailed standards for determining whether sentence should be suspended. Under these standards, the circumstances of this case obviously called for a suspended sentence conditioned on the petitioner's making application for travel documents and departing from the country. The trial court, however, imposed a savage sentence in disregard of the statutory standards, and on the basis of his own standards. This denial of suspension, being in conflict with the statutory standards, is subject to

appellate review, being as much a violation of the legislative will as imprisonment for a term in excess of the statutory maximum.

VI

Petitioner was ordered deported under a provision added to the Immigration Act of October 16, 1918 by section 22 of the Internal Security Act of 1950; 64 Stat. 1006. The statute under which he was convicted is applicable to "Any alien against whom an order of deportation is outstanding under the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 8 U.S.C. 137) . . ." Prior to the amendment provided in 64 Stat. 1006, neither the original Act of October 16, 1918 nor the cited amendments provided for deportation for past membership in the Communist Party. Hence, by its terms, the statute does not apply to petitioner.

As a criminal statute, it should be strictly construed and not extended beyond its express terms. The reference to the Act of October 16, 1918, as amended must be limited to that Act as it read at the time of the consideration of the statute. Moreover, the specific references to the amendments to the 1918 Act must be construed as limiting the applicability of the statute to these amendment. A contrary construction would render such references meaningless, and such a construction is not favored.

VII

A. The statute contemplates punishment of an alien who has committed two transgressions: (1) engaging in conduct which is cause for expulsion, and (2) willfully failing to effectuate or facilitate departure after

having been ordered expelled. The first of these elements is committed to administrative, rather than judicial, determination. Thereby the statute conflicts with the constitutional requirement that no person may be punished except after a judicial trial of all elements of the alleged offense. A deportation proceeding does not involve an administrative regulation of general and future application, but rather an administrative adjudication that the particular alien has in the past committed a specific act which has become a cause for deportation.

Because of this splitting of the offense, the accused is deprived in the deportation proceeding which adjudicates the first element of the crime of the following constitutional guarantees: the right of trial by jury, the right against double jeopardy, the right to be confronted with the witnesses against him, the right to bail pending trial, the right that failure to testify not be evidence of guilt; the rights that guilt must be proven beyond a reasonable doubt and may not be determined before one who acts as both judge and prosecutor.

Administrative adjudication of deportability for the purpose of alien expulsion has been sustained on the premise that deportation is not punishment. In this statute, deportability is one of the elements which subjects the alien to lengthy imprisonment for an infamous crime. Since imprisonment for a fixed term is clearly punishment, it can not be imposed on an administrative adjudication, but only after a judicial trial in which a jury determines the issue of deportability.

B. Expulsion of a resident alien for past conduct which when engaged in was not cause for deportation

and which does not rationally justify a conclusion that his continued residence will be detrimental to the community, has been sustained against charges of lack of due process and violation of the prohibition against ex post facto laws, on the grounds that deportation is not penal and that there are few if any due process restrictions on Congress' authority to determine which aliens are undesirable residents. This reasoning completely breaks down when, as in the case of this statute, imprisonment is a consequence of conduct causing deportability.

Here the petitioner has been convicted for a crime of which one element was that he belonged to the Communist Party between 1922 and 1930. The statute punishing him for his conduct, in conjunction with other conduct, was enacted in 1950, as was the provision making such membership a cause for deportation. Petitioner is being punished by an ex post facto law. Since he is being punished for past membership in a specifically named organization, he is being imprisoned under a bill of attainder. His punishment for organizational membership violates the First Amendment. And since petitioner's past Communist Party membership standing alone does not supply a rational basis for concluding that his continued presence in the country is detrimental, it violates substantive due process to imprison him for failing to depart from the country.

ARGUMENT

I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT ON EITHER COUNT

A. The Evidence Does Not Show a Failure to Apply for Travel Documents

The second count of the indictment alleged that petitioner willfully failed "to make timely application in good faith for travel or other documents necessary to his departure." According to the government's own evidence, nine days after the Board of Immigration Appeals sustained the deportation order, petitioner and an official of the Immigration and Naturalization Service filled out the Service form, "Passport Data for Alien Deportees." This form, as its title indicates, is regularly used by the Service to obtain travel documents, and petitioner was told that the executed form would be used for that purpose. The government's evidence also showed that the government has in many cases obtained travel documents for deportation of an alien on the basis of such form (R. 138-141).

Since the form was designed to be used for obtaining travel documents, petitioner, by causing it to be completed, thereby obviously made an application for travel documents. *United States v. Spector*, 343 U.S. 169, holds that the requirements of the country of destination determine what constitutes necessary travel documents and the application therefor. In the present case, the government introduced no evidence of what Finland, the country of destination, required by way of an application for a passport or visa. There is no basis for concluding that it required anything other than the Passport Data form which petitioner completed. On the contrary, the evidence indicates that the Passport Data form was all the application that

was necessary to obtain travel documents. After the form was completed, the Service wrote petitioner that "arrangements to effect your deportation pursuant to such order [of deportation] are being made and when completed you will be notified when and where to present your self for deportation." Surely this shows that the Service, more familiar with deportation procedures than petitioner, had no need for anything else as an application for travel documents. Furthermore, the government's own witness, Maki, testified that he did not know whether petitioner could have obtained travel documents without going through Service channels (R. 146).

Thus it appears that (1) petitioner did apply for travel documents by filling out the Service form; and (2) there is no evidence that any other step was necessary, useful, or appropriate to make application for travel documents. Hence there is no evidence of a failure to apply for travel documents.

At the trial, the thesis of the government and the judge was that petitioner was delinquent because he had not made an application directly to the Finnish authorities. This position is unsound if only because there is no evidence that Finland required (or even accepted) direct applications and that it did not recognize applications channelled through the Service.

Spector held that the statute was not unconstitutionally vague because the passport or visa requirements of the country of destination are ascertainable. But this presupposes that evidence of these requirements will be introduced, so that the jury will have something definite to apply in determining whether the accused actually did make application for travel

documents. No such evidence was introduced here, and thus the statute was made unconstitutionally vague in its application. Petitioner was convicted for failing to take some utterly undefined action which was not shown to be either necessary, useful or appropriate for the obtaining of travel documents; though he applied for travel documents through the Immigration and Naturalization Service which apparently was the usual method for obtaining travel documents; and though the Service itself did not know that any other type of application was needed or would have been useful.

Spector pointed out (at 172), "The statute might well be a trap if, for example, it required the alien to know the visa requirements of one or more countries." In sustaining the statute, the Court held that it made no such requirement. It follows that in order that the statute not be a trap, it must be shown in a prosecution under the statute, that the government requested the alien to execute a specific paper identified as the application required by the country of destination for a passport or visa and that the alien failed to comply with this request. Unless this rule is followed, then the statute does, contrary to *Spector*, require the alien to know the visa requirements of the country of destination. The record here shows that the petitioner completed the only form he was asked to complete and which was necessary for obtaining travel documents. He therefore did not fail to apply for travel documents.

B. The Evidence Negates a Failure to Depart Because Such a Failure Can Occur Only if Travel Documents Have Been Obtained or are Unnecessary

The statute punishes both a willful failure to depart and a willful failure to apply for necessary travel documents.⁷ Petitioner was convicted of both offenses solely on evidence claimed to establish the second. Also the trial court's instructions in effect directed the jury to convict of the failure-to-depart crime solely on proof of a failure to apply for travel documents. For the court instructed the jury (R. 167-8), in the only passage of the charge which contains any explanation of the failure-to-depart offense:

"You are instructed that the statute on which this indictment is laid . . . places upon an alien against whom an order of deportation is outstanding, an affirmative duty and an obligation on his part to take specific steps toward effecting his own departure from the United States, and to that end to make timely application for travel or other documents necessary to such departure. It is the alien's willful failure in that regard to fulfill such duty and obligation that is the gist of the offenses here charged."

Petitioner's conviction on the first count can be sustained, therefore, only on the theory that a non-departure attributable to a failure to apply for travel documents is a failure to depart within the meaning of the statute.⁷ By this construction, every willful failure to apply for necessary travel documents is a double offense, since it is also inevitably a willful

⁷ Even on this theory the conviction on the first count must be reversed, since, as we have seen, there was no evidence that petitioner failed to apply for travel documents. Furthermore, we later show that willfulness was not proved under either count.

failure to depart. The only way to eliminate this duplication of offenses is to construe the failure-to-depart clause as applying only to aliens who fail to depart *after* travel documents are obtained or if travel documents are unnecessary. The clause should not be applied to a non-departure resulting from a failure to apply for travel documents. This, we submit, is the correct construction of the statute. Under that construction petitioner could not have been guilty under count I, since there is no evidence that travel documents were obtained or were not needed. And since petitioner was sentenced only on the first count and not on the second (R. 175), a reversal of the conviction on the first count requires a reversal of the judgment below.

The limiting construction proposed is impelled by several principles. The canon that penal statutes must be strictly construed requires that a cumulation of offenses for the same transaction be avoided whenever reasonably possible and, if necessary, at the sacrifice of the "most literal reading." *United States v. Adams*, 281 U.S. 202, 204; *Bell v. United States*, 349 U.S. 81. As stated in *Bell* (at 83-4):

"When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. . . . It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. . . . It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses . . ."

Furthermore, the limiting construction is required under the principle that a general provision will normally not be construed to include specific prohibitions in the same enactment. The Court stated in *United States v. Chase*, 135 U.S. 255, 260:

"It is an old and familiar rule that where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment . . . This rule applies whenever an Act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include."

The same rule was set forth in *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208:

"General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling . . . The construction contended for would violate the cardinal rule that if possible, effect shall be given to every clause and part of a statute."

To like effect, *MacEvoy v. United States*, 322 U.S. 102, 107.

Under the government's construction, the failure to apply for travel documents clause is made redundant. The same is true of other portions of the statute, such as the clause punishing failure of an alien "to present himself for deportation at the time and place required

by the Attorney General." By the government's logic, such a failure of presentation also constitutes two crimes, since it would also be a "failure to depart."

Finally, the government's reading of the statute conflicts with the Fifth Amendment's prohibition against double jeopardy. The test of double jeopardy is whether the same evidence is required to sustain conviction of the two crimes. *Garcierez v. United States*, 220 U.S. 338, 342; *Morgan v. Devine*, 237 U.S. 632, 641; *Blockburger v. United States*, 284 U.S. 299, 304. The government's view makes two offenses out of the identical conduct of willful failure to apply for travel documents.

C. The Evidence Negates Willfulness

Since the crimes involved are *willful* failures, it was necessary for the government to prove that the omissions were done with specific intent and with the purpose of disobeying or disregarding the law. *Hartzel v. United States*, 322 U.S. 680; *Screws v. United States*, 325 U.S. 91; *Spies v. United States*, 317 U.S. 492; *United States v. Murdock*, 290 U.S. 389; *Spurr v. United States*, 174 U.S. 428; *Felton v. United States*, 96 U.S. 699; cf. *Morissette v. United States*, 342 U.S. 246; *Ward v. United States*, 344 U.S. 923.

Congress meant willfulness to be a meaningful and substantial element of the crime. In its original form, the proposed legislation did not include the element of willfulness. This omission was rectified by the Senate Judiciary Committee before presenting the bill in the form in which it was enacted. The Committee stated (Sen. Rep. 2369, 81st Cong., 2d Sess. to accompany S. 4037, at pp. 14-15):

"As previously reported to the Senate by the Committee on the Judiciary, H. R. 10 makes it a felony for any alien in the subversive, criminal or immoral classes against whom an order of deportation has been entered to remain in the United States after 6 months from the date of entry of such order of deportation. Section 23 of the bill modifies this penalty by including an element of willfulness."

Even if it be assumed that the government proved that the petitioner had failed to depart and had failed to apply for travel documents, there is no evidence in the record which could support findings that these failures were willful. On the contrary, the evidence negates willfulness.

In *Spector* the statute was sustained against contentions of vagueness on the assumption that the alien would be informed in some fashion of the specific steps to be required of him to apply for travel documents and that he would not be left to guess at his peril as to the proper steps to be taken. This assumption was not realized here. Moreover, if the word "willfully" in the statute is to be given meaning, there must be a showing that the accused failed to take a particular step which was requested of him or which he knew was required. No such showing was made.

In his statement which was introduced into evidence, the petitioner explained his failure to act on the ground that he had obtained the impression from his interview with Maki that he, the petitioner, need do nothing further until he heard from the Service. Petitioner then consulted with his counsel, reported this interview, and was advised to "just wait until you get official information from the immigration authorities"

(R. 103). Taken on its face, the petitioner's statement clearly establishes his innocence rather than his guilt. The government concedes as much, but argues that the jury was entitled to disbelieve the petitioner's assertions (Opp. 20-21). There was, however, no contrary evidence. Hence, assuming disbelief of petitioner, this would only have cancelled out petitioner's protestations of innocence, and left the record bare on the point. Disbelief of the petitioner cannot be converted into positive evidence of guilt.

Moreover, petitioner's assertion of good faith was corroborated by Maki's testimony and by the Service's letter of April 30. Maki, testifying for the government, acknowledged that he told petitioner in their interview that his purpose was to obtain information to be forwarded to the Chicago office of the Service for its use in obtaining travel documents. Maki did *not* say in this interview that petitioner was also obliged to make an application for travel documents on his own. What Maki admittedly said and what he left unsaid would have induced any ordinary person to believe that the Service was assuming the task of obtaining travel documents and that therefore the individual himself need take no independent action in that direction, at least until requested.⁸ The fact that Maki did not explicitly tell petitioner that he need do nothing on his own does not change the fact that what Maki

⁸ In view of Maki's testimony as to what occurred at the interview, which in essence corroborated the statement of petitioner, Maki's assertion that he made no "statement that would lead Mr. Heikkinen to gather that impression" [that Heikkinen was to wait until he heard from the Service] (R. 132-3) was simply an erroneous and inadmissible opinion characterization of the natural implications of his words.

did say inevitably, though implicitly, gave the impression that the only reasonable thing for petitioner to do was to await word from the Service.

This impression was confirmed by the Service's letter to petitioner of April 30, 1952, set out *supra*, pp. 8-9. This letter, written after the interview with Maki, informed petitioner that "arrangements to effect your deportation pursuant to such order [of deportation] are being made and when completed you will be notified when and where to present yourself for deportation."

The letter then went on to quote the language of the statute verbatim and concluded as follows: "You will recognize the importance of making every effort in good faith to obtain passport or other documents so that you may effect your departure." This generalization, written in governmental prose, cannot reasonably be taken to negative the earlier sentence which advised waiting on the Service. Nor could the language of the statute inform petitioner that he could not rely on the Service and was required to apply independently and directly to the foreign country for travel documents.

If the Service actually wished petitioner to make direct application to Finland for travel documents on his own, it should have told him so in plain language. It did not do so either by letter or verbally. On the contrary, it affirmatively induced petitioner to believe that he need take no further action, and then pounced on him for the inaction it had induced.

II. THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY

A. The Instructions Erroneously Failed to Define the Issue Involved

The chief factual issue before the jury was whether the petitioner's failure to take any action subsequent to his interview with Maki, was due to his honest belief that the matter was in the hands of the government, or whether this failure was with knowledge by petitioner that he was obliged to take independent action and in willful disregard of that obligation. This issue was never submitted to the jury, since the trial court gave no instructions on the point, and thereby failed to define the crucial question. Furthermore, the trial court told the jury that under the Act the petitioner "must take the necessary steps to effect his departure" (R. 168), but he never instructed the jury as to what those steps were. Thus, the jury was given no guide against which to determine whether the petitioner had or had not complied with the statute. A conviction cannot stand where it is based upon instructions which wholly fail to define the issues involved, or to submit to the jury the issue of a defendant's guilt or innocence. See *Yates v. United States*, 354 U.S. 298; *Bollenbach v. United States*, 326 U.S. 607; *Screws v. United States*, 325 U.S. 91; *United States v. O'Connor*, 237 F. 2d 466; *Tatum v. United States*, 190 F. 2d 612.

B. The Instructions Erroneously Eliminated Scienter

As we have seen, *supra*, p. 27, a "willful" failure to act is a failure to do what is required with specific intent and for the purpose of disobeying and disregarding the law. The thrust of the trial court's instructions was to eliminate criminal intent and willfulness as meaningful elements of the crimes and to re-

quire the jury to convict for innocent, good faith failures. The court told the jury that the petitioner "can't remain idle. He must take the necessary steps to effect his departure from this country within that period of six months. And if he fails to do so, he has violated the law and the statute involved in this case" (R. 168). He also told the jury, "Wrongful acts knowingly or intentionally committed can be neither justified nor excused on the ground of innocent intent" (R. 166).⁹ Under these instructions, the petitioner's exculpatory statement that he had done nothing after the Maki interview, because he in good faith thought he should await word from the Service, was tanta-

⁹ The trial court's instruction that the jury could convict even if petitioner's failure to act was a result of "innocent intent" was given despite the following which occurred prior to the summation. Defense counsel requested the following instructions: (1) "The mere presence in this country of an alien is not evidence of guilt" (R. 157); (2) "The mere failure to depart from this country within six months, or to make a timely application for travel documents, is not a violation of the law. There must be a wilful failure and refusal to depart within six months or to make timely application for travel document." (3) "There must be a specific intent to violate the statute." (R. 159). The trial court indicated his acceptance of the third instruction as requested (R. 159), and of the first two as modified in the following fashion: (1) "The mere presence in this country of an alien may, or may not be evidence of his guilt" (R. 161), and (2) "The mere failure to depart from this country within six months, or to make timely application for travel documents is not a violation of the law. There must be a specific intent to violate the statute and a wilful failure and refusal to depart within six months or to make timely application for travel documents, before there can be a violation of the statute involved in this case" (R. 158). The trial court, however, failed to include any of these instructions in the charge which he actually gave either verbatim or in substance.

mount to a confession of guilt. Indeed, the jury must have taken it as such since, as we have shown, there was no other evidence of guilt.

The explicit elimination of criminal intent was aggravated by the further instruction to the jury that there was no duty on the part of the government to assist the petitioner in effecting his departure, but there was an affirmative duty on the part of the petitioner to obtain travel documents (R. 168). This instruction was foreshadowed during the trial by the court's putting leading questions to a government witness and coercing affirmative responses to the same effect as the erroneous instruction (R. 133-4, 141-2).¹⁰

The jury, having been told that it was the petitioner's and not the government's "duty" to obtain travel documents and effect departure, had no alternative except to convict. Plainly enough, under this view, since the petitioner had not obtained travel documents and had not departed from the country, he had failed in his "duty" and was accordingly guilty. But of course, the question as to whether it was the government's or the petitioner's "duty" to secure travel documents was not the issue. Assuming that it was the petitioner's

¹⁰ This same witness subsequently acknowledged that he did not know whether petitioner could obtain travel documents without "going through" the Service (R. 146). For this, he was rebuked by the trial court as follows: "You had better get a book and find out something about your business" (R. 146). The trial court contributed still further prejudicial confusion by questioning this witness as to the procedure for an American citizen to obtain a passport, causing the obvious inference that the petitioner should have followed the same procedure (R. 131-2).

"duty", he would nevertheless have been entitled to an acquittal if his failure to carry out that "duty" was as a result of his good faith reliance upon the belief that the government was taking the necessary steps and would inform him if it desired further action on his part.

III. THE TRIAL COURT ERRONEOUSLY DENIED ACCESS TO THE RECORDS OF THE SERVICE'S EFFORTS TO OBTAIN TRAVEL DOCUMENTS

The trial court's fallacious view that the issue in the case was one of petitioner's duty as against the government's duty also caused him to err in refusing to grant the petitioner access to the records of the Service to determine what efforts the Service had made to secure travel documents and what success had attended such efforts. In the trial court's view, petitioner was not entitled to this information, since the government "owed him no duty" (R. 19-21). In context, this ruling was tantamount to holding that the Service was entitled to act in bad faith. For all that appears, the Service may have discovered that travel documents could not be obtained, in which event the prosecution of petitioner for failing to take a useless action would indeed be shameful and offensive to due process. The situation would be even worse if the Service had in fact obtained the necessary travel documents but was withholding them from petitioner in order to make a prosecution.

IV. THE CONVICTION CANNOT STAND BECAUSE IT RESTS ON AN UNCORROBORATED CONFESSION

The sole evidence to support the conviction was petitioner's statement to the Service, given as the result of an interview which took place without benefit of counsel. There was no other evidence to show that peti-

tioner had failed to apply for travel documents or had failed to depart. There being no evidence of guilt other than this statement, the judgment below violates the rule that an uncorroborated confession will not support a conviction in the federal courts. *Isaacs v. United States*, 159 U.S. 487; *Oppen v. United States*, 348 U.S. 84; *Smith v. United States*, 348 U.S. 147; *United States v. Calderon*, 348 U.S. 160; cf. *Warszower v. United States*, 312 U.S. 324.

The government in its opposition to certiorari argued (at p. 20), that this principle is not applicable to the present case because "The fact that [petitioner] failed to obtain documents and failed to leave the United States was at no point in dispute." But if the facts were not in dispute, it was only because they were established by petitioner's statement, since there was no other evidence offered by the government to prove these facts. Thus the government's case either rests upon the petitioner's statement or on nothing.

The government added (Opp., p. 20), "The only real issue was whether he acted willfully—whether he understood that he was himself under the duty to take these steps." But if this was "the only real issue," then the conviction must be reversed because the only evidence on this score was also contained in the petitioner's statement, and, as conceded by the government, this evidence proved the petitioner's innocence and not his guilt. No government witness testified to facts from which it could be inferred that petitioner understood that he was under a duty to make a separate application for travel documents directly to Finland, or that he was in any way advised that he was under such a duty. The government's dilemma is insoluble. The conviction either rests upon the petitioner's state-

ment, which is admittedly insufficient to support it, or else has no foundation at all, since the record contains no other evidence of guilt.¹¹

V. THE FAILURE OF THE TRIAL COURT TO SUSPEND SENTENCE WAS AN ABUSE OF DISCRETION

The statute here is unique in its specific provision for suspension of sentence and its detailed standards to guide the courts in determining whether sentence should be suspended. Under the standards of the statute, the circumstances of this case obviously called for a suspended sentence conditioned on the petitioner's making application for travel documents and departing from the country. The petitioner was sixty-six years of age at the time he was sentenced (first standard), his failure to depart had no effect upon the national security and public peace or safety (second standard), there was no likelihood of his repeating the conduct which made him deportable (third standard), and he had cooperated with the Service in the procurement of travel documents and was willing to make further efforts to obtain such documents. In fact he had already secured the necessary travel documents to depart to Finland and had been prevented from departing only by the indictment in the present case and the consequent necessity of his remaining in this country for trial (fourth standard). The fifth and sixth standards listed in the statute have no applicability to this case in either direction.

¹¹ The reference in the government's opposition (pp. 8, 20) to the testimony that petitioner could have entered Canada obviously cannot support the verdict, since this incident occurred "a considerable time after" the period covered by the indictment (R. 87), and was accordingly not relied upon by the prosecution at the trial (R. 87).

Despite this, the trial court imposed a savage sentence of five years, in disregard of the statute's policy of mercy. He ignored the guides for sentencing as set out in the statute, and imposed a prison sentence on the basis of his own standards, which on their face are vindictive in character. The trial court recited the following considerations for his decision: (1) The petitioner had declined to go to Canada rather than to Finland;¹² (2) he had never become a citizen despite his long residence in the country; (3) he had been a member of the Communist Party; (4) he had been to Russia and had come back to the United States without a passport; (5) he was an intelligent man; (6) he had received the protection of all the laws of the United States, "rights that he wouldn't have gotten in Russia, that an American citizen wouldn't have gotten in Russia"; (7) the petitioner was guilty of violating the statute here involved (R. 174-5).

Clearly the sentence was imposed in clear violation of the statutory policy and the standards set out by Congress. Federal appellate courts do not review the severity of sentences within statutory limits. But the sentence here violates statutory limit because suspension was refused contrary to the standards of the act. This is as much a violation of the legislative will as imprisonment for a term in excess of the statutory maximum. If the conviction is sustained, the Court should, in view of the circumstances unequivocally calling for a suspended sentence conditioned on petitioner's applying for travel documents and departing

¹² The statute expressly gives an alien under order of deportation first choice as to the country to which he may depart. See 8 U. S. C. sec. 1253.

the country, direct imposition of a suspended sentence so conditioned. See 28 U.S.C. sec. 2106.

VI. THE STATUTE UNDER WHICH PETITIONER WAS CONVICTED DOES NOT APPLY TO PERSONS ORDERED DEPORTED UNDER THE PROVISIONS ADDED TO THE IMMIGRATION ACT OF OCTOBER 16, 1918 BY THE INTERNAL SECURITY ACT OF 1950

Petitioner was ordered deported under a provision added to the Immigration Act of October 16, 1918, by section 22 of the Internal Security Act of 1950, 64 Stat. 1006. The statute under which he was convicted is applicable to "Any alien against whom an order of deportation is outstanding under the Act of October 16, 1918, as amended (40 Stat. 1012; 41 Stat. 1008, 54 Stat. 673, 8 U.S.C. 137) . . ." Prior to the amendment provided in 64 Stat. 1006, neither the original Act of October 16, 1918 nor the cited amendments provided for deportation for past membership in the Communist Party, which was the basis for the order of deportation in this case. Hence, by its terms the statute does not apply to aliens who like the petitioner were ordered deported on the charge of past membership in the Communist Party.¹³

Since the statute does not cover petitioner's case by its terms, the indictment was insufficient and should have been dismissed. As a criminal statute, it should be strictly construed and not extended beyond its express terms. *United States v. Baltimore & O. S. W. R.*

¹³ The provision as carried forward by Section 242(e) of the Immigration and Nationality Act of 1952, 8 U. S. C. Sec. 1252(e), by its terms covers aliens ordered deported on the ground of past membership in the Communist Party. However, this provision was not in effect at the time of the period covered by the indictment.

Co., 222 U.S. 8; *Prussian v. United States*, 282 U.S. 675; *United States v. Resnick*, 299 U.S. 207; *United States v. Halseth*, 342 U.S. 277. The reference to the Act of October 16, 1918, as amended, must be limited to that Act as it read at the time of consideration of the statute, and cannot include within it other changes made to the 1918 Act. *Re Heath*, 144 U.S. 92; *Hassett v. Welch*, 303 U.S. 303. Moreover, the specific statutory references to the amendments to the 1918 Act must be construed as limiting the applicability of the statute to those amendments. A contrary construction, and one which would include within the scope of the statute the provision for deportation added by Section 22 of the Internal Security Act of 1950, would make meaningless the reference in the statute to the specific provisions amending the 1918 Act, not including that amendment. A statutory construction which renders meaningless specific references to previous acts is not favored. *Wisconsin C. R. Co. v. United States*, 164 U.S. 190.

VII. THE STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED

A. The Statute Violates the Constitution by Providing for Administrative Rather Than Judicial Determination of One of the Elements of the Offense

In *United States v. Spector*, 343 U.S. 169, the Court refused to consider, because the issue was not raised by counsel, whether the self-deportation statute is unconstitutional by virtue of the fact that an accused's deportability is established by an administrative finding. Justices Jackson and Frankfurter, dissenting, concluded in an opinion by Justice Jackson (at 174-180) that the statute was invalid in this respect, and Justice Black expressed tentative agreement with their posi-

tion (at 171, fn. 2). On principle and by precedent, it is clear that the statute is unconstitutional for the reasons stated in Justice Jackson's opinion.

The statute is meant to implement the deportation laws. It contemplates punishment of an alien who has committed two transgressions: (1) engaging in conduct—in this case, joining the Communist Party—which is by law cause for expulsion; and (2) willfully failing to effectuate or facilitate departure after having been ordered expelled. The first of these elements supplies the occasion and justification for the exercise of Congressional authority. Yet the statute commits this element to administrative, rather than judicial, determination. Thereby the statute conflicts with the constitutional requirement that no person may be punished except after a judicial trial of all elements of the alleged offense.

It is true that criminal penalties may be imposed for violations of administrative rules and regulations. And it has also been held that in that situation, an accused may be limited to challenging the validity of the administrative regulation in a proceeding other than in the prosecution itself. *Yakus v. United States*, 321 U.S. 414. But this case is different, for it involves not an administrative regulation of general and future application, but an administrative adjudication that the particular alien has in the past committed a specific act which has become a cause for deportation. In this case, therefore, the accused is being punished not for violating an administrative regulation, but for the conduct in which he is administratively determined to have engaged. Justice Jackson pointed out this key distinction in his opinion in *Spector* (at 179):

"It must be remembered that the deportation proceeding is an exercise of adjudicative, not rule-making power. The issue on which evidence is heard is whether the alien has committed acts which are grounds for deportation. The decision is whether he is guilty of such past conduct, and, if so, the legal result is liability to deportation. This is not the type of administrative proceeding which results in a rule or order prescribing rates or otherwise guiding future conduct."

Accordingly, the court below was wrong in considering (R. 224) that the *Yakus* case applies to this case.

The constitutional invalidity of the statutory scheme was analyzed by Justice Jackson as follows (*Spector* at 177):

"This Act creates a crime . . . based on unlawful residence in the United States. The crime consists of two elements: one, an outstanding order for deportation of an alien; the other, the alien's willful failure to leave the country or take specified steps toward departure. The Act does not permit the court which tries him for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no inquiry into the correctness or validity of the order is permitted.

"The subtlety of the present Act consists of severing the issue of unlawful presence for administrative determination which then becomes conclusive upon the criminal trial court. We must not forget that, while the alien is not constitutionally protected against deportation by administrative process, he stands on an equal constitutional footing with the citizen when he is charged with crime. If Congress can subdivide a charge against

an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom."

In deference to Justice Jackson's dissent in *Spector*, the courts below construed the statute as if it provided that in the criminal trial the judge was required to review the record of the deportation hearing to determine whether or not that record was free from error. There is nothing in the language of the statute that authorizes such a procedure, since by its terms the statute applies to any alien "against whom an order of deportation is outstanding."

Assuming, however, that such a construction of the statute is permissible for constitutional reasons, still it does not go far enough to meet the constitutional objection. For there still remain numerous other constitutional safeguards which are required in a criminal prosecution but which, since they do not apply in an administrative deportation proceeding, are not available to one prosecuted under the statute. Thus, the following guarantees are not applicable in deportation proceedings: the right of trial by jury, guaranteed by Article III, sec. 2 and the Sixth Amendment; the right not to be prosecuted except upon indictment by grand jury, guaranteed by the Fifth Amendment; the right against double jeopardy, guaranteed by the Fifth Amendment, (cf. *Bridges v. Wixon*, 326 U.S. 135); the right guaranteed an accused by the Sixth Amendment to be confronted with the witnesses against him,

(cf. *Hyun v. Landon*, 219 F. 2d 404, aff'd 350 U.S. 990); the right to bail pending trial, (cf. *Carlson v. Landon*, 342 U.S. 524); the right that an accused's failure to testify is not evidence of guilt, guaranteed by the Fifth Amendment, (*United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149; *United States ex rel. Vajtauer v. Commissioner*, 273 U.S. 103); the due process rights that guilt must be proven beyond a reasonable doubt and may not be determined before one who acts as both judge and prosecutor (cf. *Marcello v. Bonds*, 349 U.S. 302; *Belizaro v. Zimmerman*, 200 F. 8d 282).¹⁴

As Justice Jackson stated (*Spector* at 178):

"The adjudication that an alien has been guilty of conduct subjecting him to deportation is not made by procedures constitutional for judgment of crime. It is not made either by a jury trial or a court decision. All that is required by statute is a hearing before an administrative officer and that may be before one who acts both as the alien's judge and prosecutor. The finding that the alien is guilty of conduct subjecting him to deportation does not require proof beyond reasonable doubt but may be made on mere preponderance of evidence. If the determination of deportability is subject to review . . . any evidentiary attack raises only the question whether on the record as a whole there is substantial evidence in support of the order . . . No statute of limitations applies in some cases and the offense which renders the alien deportable may have occurred, but ceased, many years ago, while under statutes applicable to crimes, the same act, if a crime, long would have ceased to be subject to prosecution."

¹⁴ So in the present case the Court below upheld the deportability of petitioner although it was established by a standard of preponderance of the evidence and in a proceeding in which the hearing officer acted as both judge and prosecutor (R. 224-5).

Although this Court has sustained administrative adjudication of deportability for the purpose of alien expulsion, it has done so on the premise that deportation is not penal in nature. In this statute, however, the fact that the alien engaged in conduct making him deportable is one of the circumstances which subjects him to lengthy imprisonment for an infamous crime. As Justice Jackson pointed out (*Spector* at 178):

“Administrative determinations of liability to deportation have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations. That doctrine, early adopted against sharp dissent has been adhered to with increasing logical difficulty as new causes for deportation, based not on illegal entry but on conduct after admittance, have been added, and the period within which deportation proceedings may be instituted has been extended. By this Act a deportation order is made to carry potential criminal consequences.”

Since imprisonment for a fixed term is clearly punishment, it can not be imposed administratively, but only after a judicial trial in which a jury determines the issue of deportability. This appears not only from principle, but also, from *Wong Wing v. United States*, 163 U.S. 228. The controlling nature of that case was described by Justice Jackson in *Spector* as follows (at 176-7):

“Thus the Court held that the Constitution prohibited *for criminal purposes* a judicial determination without a jury that the alien was illegally present in the United States. It held that the facts which made his presence illegal must be established to the satisfaction of a jury, although the actual case before it seems to have presented

only the narrowest and simplest issues, namely, whether the alien was a Chinaman and whether he was here. If so, his entry and his presence at any time were illegal. In contrast, this Act ineliminates those whose presence here is entirely legal but for guilt of some forbidden conduct since entry. Certainly illegal presence under present laws involves a much more trialworthy issue than in Wong Wing's case."

The fact is that the statute, by providing for administrative determination of one of the elements of the offense, is pro tanto a bill of attainder, prohibited by Article I, section 9, and defined as "a legislative Act which inflicts punishment without judicial trial." *Cummings v. Missouri*, 71 U.S. 277, 323.

The court below was mistaken in its reliance (R. 224) on *Cox v. United States*, 332 U.S. 442. That case affirmed convictions for violation of the military draft act where the accused had been denied exempt classifications by their draft boards without permitting a de novo jury determination of the classifications. But administrative classification for draft purposes does not involve a determination of whether the individual was guilty of past misconduct. A draft exemption is a grant of a privilege excusing the individual from an obligation which is applicable to all citizens in his age group.¹⁵ Obviously administrative determination that a person is not entitled to an exceptional privilege differs vastly from an administrative determination that the person is guilty of such past misconduct as to subject him to

¹⁵ It is this special nature of an application for a privileged classification that underlies the ruling of this Court that an applicant for such privilege is not entitled to see the FBI report upon which his claim is rejected. *United States v. Nugent*, 346 U. S. 1.

deportation. In the draft cases, the government's case is complete when it shows refusal to accept the military service, and the claim that an exemption should have been granted is defensive. Under the present statute, however, deportability by reason of past conduct is an essential element of the offense. It therefore must be affirmatively proved, and, this being the case, it must be proved in a judicial proceeding before a jury, not in an administrative proceeding.

B. The Statute Is Invalid by Reason of Its Imposition of Criminal Punishment for Past Membership in the Communist Party

As we have seen, a necessary element of the crime is the alien's deportability. The statute does not apply to all deportees, but only to those deported for certain causes. In petitioner's case the cause for his order of deportation was his alleged past membership in the Communist Party as provided in the Internal Security Act of 1950.¹⁶

Expulsion of a resident alien for such past conduct which when engaged in was not cause for deportation and which does not rationally justify a conclusion that his continued residence will be detrimental to the community, has been sustained against charges of lack of due process and violation of the prohibition against ex post facto laws, on the grounds that deportation is not penal and that there are few if any due process restrictions on Congress' authority to determine which aliens are undesirable residents. *Galvani v. Press*, 347

¹⁶ The petitioner was also ordered deported upon the ground that he had last entered the United States without an immigration visa. But deportability on that ground does not subject an alien to the provisions of the self-deportation statute.

U.S. 522; cf. *Harisiades v. Shaughnessy*, 342 U.S. 580. As Justice Jackson pointed out in *Specter* (at 178), supra, p. 44, this reasoning completely breaks down when, as in the case of this statute, imprisonment is a consequence of conduct causing deportability. There can be no justification for not applying to this statute the substantive restrictions which the Constitution imposes on Congress' power to define and punish crimes.

Here, the petitioner has been convicted for a crime of which one element was that he belonged to the Communist Party between 1922 and 1930 (supra, p. 6 fn: 4). Yet the statute punishing him for this conduct, in conjunction with other conduct, was not enacted until 1950. Moreover, at the time petitioner belonged to the Communist Party, that was not a cause for deportation and it was not made a cause for deportation until 1950. Clearly, therefore, petitioner is being punished by an ex post facto law. Furthermore, since he is being punished for past membership in a specifically named organization, he is being imprisoned under a bill of attainder. Also, his punishment for organizational membership violates the First Amendment. And since petitioner's past Communist Party membership standing alone does not supply a rational basis for concluding that his continued presence in the country is detrimental, cf. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, *Wiemann v. Updegraff*, 344 U.S. 183; it violates substantive due process to imprison him for failing to depart from the country.

Suppose Congress enacts a statute that any alien who has ever been a member of the Communist Party is guilty of a felony if he does not within six months make good faith efforts to leave the country. This legislation would be a glaring violation of the pro-

hibitions against ex post facto laws and bills of attainder, of substantive due process, and of the First Amendment. The statute here involved has the same defects. It differs from the hypothetical legislation only by reason of the fact that it provides for administrative determination of the question of Communist Party membership. But this circumstance, as we have seen, merely adds procedural constitutional vices; it can not cure the violations of substantive restrictions of the Constitution.

The brief for petitioner in *Rowoldt v. Perfetto*, No. 5 this Term,¹⁷ states the grounds for considering unconstitutional the statute requiring the deportation of aliens who had been members of the Communist Party. If those arguments prevail, then obviously the conviction of petitioner must be reversed because it is founded upon an unconstitutional order of deportation. But if the Court, adhering to its views in *Galvan*, sustains the deportation statute on the ground that deportation does not inflict punishment and is not governed by ordinary due process limitations, the arguments in *Rowoldt* remain applicable to the question of whether the self-deportation statute is invalid by reason of inflicting punishment for an offense of which one element is past membership in the Communist Party. Accordingly, we rely upon the arguments in petitioner's brief in *Rowoldt* to support our positions here that (1) the deportation order against petitioner is unconstitutional, and (2) in any event it is unconstitutional to imprison petitioner for a crime bottomed on the deportable act here involved.

¹⁷ The case was originally No. 34, October Term, 1956, but it was set down for reargument for this Term 354 U. S. 934.

CONCLUSION

The judgment below should be reversed with directions that the indictment be dismissed, or a judgment of acquittal entered.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 89

KNUT EINAR HEIKKINEN, *Petitioner*,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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IN THE
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REPLY BRIEF FOR PETITIONER

I. THE ALLEGED FAILURE TO APPLY FOR TRAVEL
DOCUMENTS

The government assumes that the statute contains a clear and unequivocal command that an alien under an order of deportation make an independent application for travel documents directly to the country of his choice, and without regard to any advice or instruc-

tions he might receive from the Immigration Service. From this premise, the government draws two conclusions: (1) that petitioner's furnishing the Service with the requisite information for travel documents with the understanding that such information would be forwarded to the Finnish authorities was not any kind of application for travel documents (Govt. Br. 42, fn. 17), and (2) that the sending by the Immigration Service to the petitioner of the text of the statute informed him that he was required to make an independent application for travel documents directly to Finland (Br. 29-33).

The government, however, reads into the statute more than is there. The statute requires an alien under order of deportation "to make timely application in good faith for travel or other documents necessary to his departure." It does not define "application" or say that the alien must apply directly to the country involved and independently of the Service. Hence, to apply the statute in any specific case, it is necessary to prove the requisite procedure for obtaining travel documents from the particular country and that this procedure was brought to the notice of the alien. Accordingly, to sustain a conviction here, the government would have had to show (1) that an application for travel documents must be made directly to Finland by the alien himself, and (2) that the petitioner was so informed. But no such evidence was produced here. On the contrary, such evidence as was produced showed (1) that the normal method for procuring travel documents was through Service channels, (2) that so far as any of the Service witnesses who testified were aware, there was no other method for the petitioner to obtain travel documents, and (3)

that the Service fostered this understanding by petitioner.

II. THE ALLEGED FAILURE TO DEPART

1. The government misconceives our argument as to the relation of the offenses of failure to depart and the failure to apply for travel documents. We do not, as stated by the government (Br. 34), contend that an alien cannot be guilty of both offenses. Our position is that the offenses are not identical, and that the failure-to-depart crime cannot be proved solely by evidence of a failure to apply for travel documents. This means, by a natural interpretation which avoids duplication of punishment, that the failure-to-depart crime can be committed only after the necessary travel documents have been obtained (by the Service or by the alien) or if travel documents are not necessary.

The government itself at one point seems to agree with our position. Initially, it distinguishes the failure-to-depart crime from the failure to apply for travel documents as follows (Br. 34): "The two offenses, separated in the statute by the disjunctive 'or' have different elements. An alien may depart informally without travel documents. On the other hand, an alien may obtain travel documents and not depart." Under this view, the conviction here for failure to depart must fall, since there was no evidence that travel documents had been obtained or that the petitioner could have left the country "informally" without travel documents. Subsequently, however, the government departs from its own analysis to argue (Br. 36-37) that a failure to depart can be proved solely by a failure to apply for travel documents. This has the vice

which the government itself repudiates of making the offenses identical.

Moreover, as indicated in our main brief (at p. 24), the trial court instructed the jury that the two offenses were identical and that they could find petitioner guilty of a failure to depart solely upon evidence of his failure to apply for travel documents.¹

2. Nor is there any merit to the suggestion of the government (Br. 30, ftn. 11, and Br. 36), that the petitioner's conviction of a failure to depart can be supported by the evidence that he was a Canadian citizen, a circumstance showing, according to the government, that he could have departed to Canada within the six months period. As the government itself recognizes (Br. 30), however, the fact that he was a citizen of Canada does not mean that he could have entered Canada without first securing travel documents from that country. For an entry into Canada would have required that country to recognize the alien as a Canadian citizen and to indicate in some documentary form its willingness to receive him. Nor is there any warrant in the record for the government's intimation (Br. 32), that the petitioner could have obtained travel documents to Canada before the six months had expired. The government was not able to secure these docu-

¹ The government's intimation (Br. 38, ftn. 14) that the excerpt from the instructions set out in our main brief at p. 24 does not give a fair picture of the instructions on this question is not well taken. This was the only portion of the instructions in which the trial court defined the ingredients of the failure to depart offense. The references in the government's brief to other portions of the instructions are only to the court's reading of the indictment. Significantly, the government nowhere indicates any portion of the instructions in which the trial court distinguished between the elements necessary to prove the two offenses.

ments until "quite a long time after" the six month period had expired (R. 87).

Moreover, the Government's belated reliance in its brief upon Canada as a country for departure, a reliance expressly repudiated by the prosecutor at the trial (R. 87), is not justified under the statute. Section 20(a) of the Immigration Act of February 5, 1917, as amended by section 23 of the Internal Security Act of 1950, 64 Stat. 1010,² provided that an alien must be deported to the country of his choice if that country "is willing to accept him." Thus, until and unless the petitioner had been refused entrance to Finland, he was entitled to refuse to go to Canada.³ There is nothing to show that Finland had refused to accept petitioner. On the contrary, we do know that petitioner obtained travel documents for Finland at a later date, although the record does not reveal by what method such documents were obtained.⁴

3. The legislative material referred to by the government at pp. 35-36 has no bearing on this case. All of the materials cited relate not to the statute enacted by Congress, but to earlier legislative proposals, none of which penalized a failure to apply for travel documents. The specific quotation from the Congressional Record at the top of p. 36 was made in the course of the congressional debate on H. R. 10, 81st Cong., 1st

² This section was carried forward in a revised form in the Immigration and Nationality Act of 1952. 8 U.S.C. sec. 1253.

³ See our main brief at p. 37, for the trial court's erroneous consideration of the petitioner's preference for Finland rather than Canada as a factor in imposing sentence.

⁴ Petitioner was prevented from departing for Finland by his indictment (See our main brief, p. 13).

Sess., a bill which did not provide for criminal offenses at all, but provided instead for the indefinite detention by the Attorney General of aliens who could not be deported because of the inability of the government to secure travel documents.⁵ The debates and reports on these rejected proposals can throw no light on the narrow question involved here—which is whether Congress, in the statute which it did enact, intended to make a failure to apply for travel documents a double offense.

III. WILLFULNESS

A. The Instructions

The government concedes that the petitioner could not properly be convicted unless the jury was instructed that the alleged failure of the petitioner must be "willful and not innocent," and that, in the particular context, this meant that the jury had to find that petitioner "knew that he had to go forward, himself, with the procurement of travel documents" and did not "sincerely" believe "that he could properly wait for the government to produce such papers" (Br. 27-28). It contends, however, that the instructions which the trial court gave to the jury were adequate for that purpose. It quotes in extenso from the instructions at pp. 26-27, but nowhere refers to any specific language which could possibly convey this thought to the jury.

As support for its contention that the instructions were adequate, the government relies upon the trial court's repetition of the word "willfully" (Br. 26), and his instructing the jury that "'Willful' as used in this

⁵ This proposal was rejected because of Congressional doubts as to constitutionality. See Sen. Rep. 2239, 81st Cong. 2d Sess. p. 8.

statute, means an intentional failure and refusal to comply with the order of deportation" (Br. 27). On its face this instruction was inadequate to convey to the jury the issue even as formulated by the government above. Moreover, the definition of the word "willful" is not in accord with that approved by this Court.

The leading case on the meaning of "willful" in this Court is *Felton v. United States*, 96 U. S. 699. The doctrine of that case, which has been consistently followed by this Court, was set out as follows, at 702:

"Doing or omitting to do a thing knowingly and willfully, implies, not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it. The word "willfully" says Chief Justice Shaw 'in the ordinary sense in which it is used in statutes means not merely "voluntarily" but with a bad purpose.' *Com v. Kneeland*, 20 Pick 220. 'It is frequently understood' says Bishop 'as signifying an evil intent without justifiable excuse.' *Cr. L. Vol. 1, sec. 428.*"

The same rule was formulated at a later date as follows in *United States v. Murdock*, 290 U. S. 389, at 397-8:

"The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."

At no time did the trial court tell the jury here that the failures must have been committed with bad faith or evil intent. On the contrary, the court expressly instructed the jury (R. 166) that "Wrongful acts know-

ingly or intentionally committed can be neither justified nor excused on the ground of innocent intent."

The government also suggests that the jury understood the issue in the case "from the course of the trial" (Br. 27). This suggestion is not documented in any way. And to the contrary is the fact, shown in our main brief (at 33-34), that the "course of the trial" was consistent with the view taken by the trial judge in his instructions—i.e., that petitioner was guilty if he failed to carry out his "duty to depart," even if his intent was innocent. Moreover, the "course" of a trial cannot cure erroneous or inadequate instructions. "The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria . . . we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them." *Bollenbach v. United States*, 326 U. S. 607, 613-614.

B. The Evidence

The government recapitulates (Br. 29-31) the items of evidence which it contends would have justified the jury in finding criminal intent, if the issue had been put to them. ~~There~~ The items do not, singly or in the aggregate, support a finding of guilt. Item 1 of the government's evidence consists of the letter of April 30, which, as we have shown (Br. 30), advised the petitioner that he should wait until he heard from the government. Nor could the text of the statute contained in that letter possibly convey to the petitioner notice that the Service wished him to take steps on his own. This letter therefore is evidence of innocence, not guilt. Item 2 is the irrelevant and unilluminating circumstance that petitioner lived near Duluth. Item 3 is the

testimony of government "witnesses"⁶ that they had not said anything which would lead petitioner to assume that he could wait to hear from the government. But this testimony was a mere conclusory statement of Maki which was contrary to the actual facts of the interview (see our main brief, p. 29 and fn. 8). Moreover, even if this conclusory testimony corresponded to the facts, it would merely negate a possible defense, not supply evidence of guilt. What is significant is that the government nowhere points to any testimony or documentary evidence that could possibly support the inference that petitioner knew or was advised that he was required to make an independent application to Finland. The fourth item—that petitioner was recognized as a Canadian citizen after the critical six-months period—we have already discussed. The fifth item is both a misstatement of the record and irrelevant. The government states that after the period covered by the indictment, petitioner was advised that "he could not merely await government action and must make periodic reports of his own efforts to obtain travel documents." The record (R. 122) does not support this statement. Petitioner was merely given a form in which he was asked to report on efforts he made to depart. But at no time was he told that he was required to make such efforts independent of the service or that he could not wait until he heard from the Service. Moreover, since the form was given to petitioner after the six-month period, he could not thereby have been notified

⁶ Although the government refers to witnesses in the plural, its only reference is to the testimony of Maki (Br. 9), and in fact Maki was the only government official who spoke to petitioner during the six months period.

during the critical period of any obligation to make an independent application.

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FILED

APR 5. 1957

JOHN T. FEY, Clerk

No. ~~819~~ 89

In the Supreme Court of the United States

OCTOBER TERM, 1956

KNUT EINAR HEIKKINEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-14a) is reported at 240 F. 2d 94.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 15a) was entered on January 17, 1957, and a petition for rehearing was denied on February 4, 1957. The petition for a writ of certiorari was filed on March 6, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 20(c) of the Immigration Act of 1917, as amended in 1950—imposing criminal penalties upon an alien ordered deported who shall “willfully” fail to depart from the United States within 6 months or who shall “willfully” fail to make timely application for travel documents—is unconstitutional because it does not provide for a retrial by a jury of the administrative determination that the alien is deportable.

2. Whether the offense of willful failure to depart is excused where the impossibility of departure is created by the alien’s own additional offense of willful failure to apply for the necessary travel documents.

3. Whether the 1950 enactment, imposing penalties on one ordered deported under the 1918 Act “as amended”, is inapplicable to petitioner because parenthetical citations of the amendments to the 1918 Act, as set forth in the 1950 enactment, did not cite the 1950 amendment to the 1918 Act.

4. Whether the trial court’s instructions on willfulness were correct, and whether the evidence supported a finding of willfulness.

5. Whether petitioner’s conviction rests upon his own statements rather than on the facts proven by government witnesses.

6. Whether there was any abuse of discretion in the sentence.

STATUTES INVOLVED

Section 20(c) of the Immigration Act of February 5, 1917, as amended (39 Stat. 890, 57 Stat. 553, 64 Stat.

¹ Petitioner’s argument (Pet. 14-23) discusses 6 numbered issues in which his 8 “questions presented” (Pet. 2-3) appear in combination and in varying order. We adopt here the numbering and order appearing in his argument.

1010; 8 U.S.C. (1946 ed., Supp. IV) 156(c)), provided in pertinent part:

Any alien against whom an order of deportation is outstanding under (1) the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 8 U.S.C. 137); (2) the Act of February 9, 1909 as amended (35 Stat. 614, 42 Stat. 596; 21 U.S.C. 171, 174-175); the Act of February 18, 1931, as amended (46 Stat. 1174, 54 Stat. 673, 8 U.S.C. 156a); or (4) so much of section 19 of the Immigration Act of 1917, as amended (39 Stat. 889-890; 54 Stat. 671-673, 56 Stat. 1044; 8 U.S.C. 155) as relates to criminals, prostitutes, procurers or other immoral persons, anarchists, subversives and similar classes, who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of the Subversive Activities Control Act of 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: *Provided*, That this subsection shall not make it illegal for any alien to take any proper steps for the purpose

of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: *Provided further*, That the court may for good cause suspend the sentence of such alien and order his release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify releasing the alien, the court shall take into account such factors as (1) the age, health, and period of detention of the alien; (2) the effect upon the national security and public peace or safety; (3) the likelihood of the alien's following a course of conduct which made or would make him deportable; (4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States; (5) the reason for the inability of the Government of the United States to secure passports, other travel documents, or deportation facilities from the country or countries to which the alien has been ordered deported; and (6) the eligibility of the alien for discretionary relief under the immigration laws.

Sections 1 and 4(a) of the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 64 Stat. 1006; 8 U.S.C. (1946 ed., Supp. IV) 137, 137-3(a)), provided in pertinent part:

[Sec. 1]. That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * *

*

*

*

*

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt. * * *

Sec. 4 (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Seventh Circuit (Pet App. 15a)

affirming the judgment of the District Court for the Western District of Wisconsin (R. 179-180), upon the verdict of a jury (R. 179), finding petitioner guilty of willful failure to depart from the United States within six months of the entry of an order of deportation (Count One, R. 1-2) and willful failure to make timely application for travel or other documents necessary to his departure (Count Two, R. 2). The record may be summarized as follows:

Petitioner is an alien born in Finland in 1890. He emigrated to Canada in 1910 and acquired Canadian citizenship. He was admitted to the United States for permanent residence in 1916. Subsequent to 1928, he made numerous departures from and re-entries into the United States without the required travel documents. From 1923 to 1930 he was a member of the Communist Party while in the United States. He spent approximately three years, from 1932 to 1935, in the Soviet Union, returning to the United States in 1935 (R. 174-175; Pet. App. 2a).

The initial finding of deportability in the deportation proceedings, dated May 4, 1951 (R. 58, 70), was affirmed by the Assistant Commissioner on October 8, 1951 (R. 58, 70), and by the Board of Immigration Appeals (R. 71). It provided for deportation under the Act of October 16, 1918, as amended, because of petitioner's membership in the Communist Party (R. 70-71).² On April 30, 1952, the Immigration and

² The deportation proceedings, upon extensive review by the trial judge, were found valid as a matter of law (R. 47, 63-68, 152, 163, 166-167), and this conclusion is not challenged in the questions here presented which relate, instead, to petitioner's contention that a *jury* retrial of the issue of deportability is essential to constitutionality.

Naturalization Service officer-in-charge at Duluth, Minnesota, notified petitioner, by registered mail, at Superior, Wisconsin, where petitioner resided, that an order directing his deportation had been entered on April 25, 1952 (R. 73-75, 77-78). In this notice, it was stated that arrangements were being made to effect the deportation and, when those were completed, petitioner would be notified when and where to present himself for deportation. The notice also set forth the statutory penalty upon an alien guilty, *inter alia*, of willful failure or refusal to depart from the United States within six months or to make timely application for necessary travel documents, and concluded with the warning (R. 75):

Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950.

At the time of this notice, petitioner was associate editor of a newspaper printed in the Finnish language at Superior, a city located "practically together" with Duluth, where the office of the Immigration Service was located (R. 78-79).

The officer in charge of the Duluth office testified that petitioner failed to depart (R. 84).³ The officer did not know, and would not necessarily know, of any steps by

³ Petitioner is in error in stating (Pet. 9) that Exhibit 8 (his own statement to an investigator) was the sole evidence that petitioner had failed to depart; government witnesses also testified thereto.

the government to obtain travel documents (R. 82-83). He further testified that a Canadian passport was presented to petitioner; that petitioner could have proceeded to Canada;⁴ and that petitioner's Canadian citizenship was not terminated until after the six months' period for petitioner's departure (R. 85-87). The officer-in-charge directed a subordinate, Maki, to obtain "data concerning his birth and so forth" for the file, to be sent to the District Director of the Immigration and Naturalization Service at Chicago (R. 88-89).

Maki testified that on or about April 18, 1952, he interviewed petitioner for data to be recorded on a passport data form (R. 126). Maki informed petitioner that the form would be sent to Chicago to be considered by the Service with a view toward the Service's obtaining travel documents, which it sometimes did (R. 128, 138-139, 144-145), but that the obtaining of the information did not necessarily mean that the Service would follow through and obtain or attempt to obtain travel documents (R. 129). Maki said nothing to petitioner to indicate that the government would apply anywhere for a passport. He was in no position to do so (R. 130-135, 140-142).

John J. Boldin, an investigator for the Immigration and Naturalization Service, testified that when the six months' period expired in October 1952, and petitioner, pursuant to the statute, was placed under the supervision thereafter required, Boldin inserted in the supervision order a provision requiring petitioner to report on his efforts to effect departure from the United States (R. 122). Petitioner did not comply with this provi-

⁴ Only nominal additional papers apparently would have had to be obtained. See R. 140-141.

sion of the order of supervision and at no time reported such efforts (R. 122).

Boldin further testified that on February 12, 1953, he interviewed petitioner with respect to his failure to comply with the notice of April 30, 1952, requiring departure from the United States by October 25, 1952 (R. 93-94, 99, 101). The questions and petitioner's answers were transcribed at the time into a statement sworn to and signed by petitioner, and introduced in evidence (Ex. 8; R. 94-95). In his answers, petitioner asserted that he had understood from his prior interview with Maki that the government, and not he (petitioner), would obtain the travel documents and that petitioner would not need to do anything until he heard from the government (R. 102-106).

The trial judge instructed the jury *in extenso* on the required element of the willful intent (see the Argument, *infra*, pp. 16-18). He refused petitioner's request to instruct that petitioner's continued presence in the United States was not "evidence" of guilt (R. 157).

Petitioner was sentenced to five years' imprisonment on the first count (R. 180). On the second count, imposition of sentence was suspended until after service of the sentence imposed on the first count (R. 180); the trial court indicating probable grant of probation for time in which to effect departure if petitioner then made a genuine effort to depart (R. 175-176).

⁵ Petitioner is in error in stating (Pet. 13) that he was denied an instruction that mere failure to depart is not a violation of the law without willfulness. See R. 158, 166, 168. Petitioner made no objection to the failure to include the literal language of his proposed instructions 7 and 11 (R. 170-171).

ARGUMENT

1. Petitioner was tried before a jury under the statute (*supra*, pp. 3-4) which imposes a penalty upon an alien ordered deported who willfully fails to leave the United States within 6 months or willfully fails to make timely application for travel documents necessary to his departure. The validity of the deportation order, which gave rise to the duties to depart and to apply for documents, has been held in this very proceeding to be subject to judicial review by the trial court as an issue of law,⁶ and the order was so reviewed at this trial by the judge.⁷ Petitioner, relying upon the dissenting opinion in *United States v. Spector*, 343 U.S. 169, 174 (which assumed, however, that under the statute the deportation order *would not be reviewable at all*), argues that, as so construed, the statute is unconstitutional in that the validity of the deportation order is not passed upon by the jury.

This argument is based on a misconception of the nature of the offense. The crime does not consist in being declared deportable, but rather in certain willful conduct when a valid order of deportation is outstanding. The administrative proceeding which results in the order of deportation makes petitioner a deportable alien. But the crime itself is action or non-action by the alien subsequent to, and separate from, the deportation proceeding.

It is a familiar concept in criminal law that a status, liability, or duty may be established administratively, to be followed by criminal consequences in the event of

⁶ See the prior opinion in *United States v. Heikkinen*, 221 F. 2d 890 (C.A. 7).

⁷ Petitioner does not argue that the court's upholding of the deportation order is erroneous. See fn. 2, *supra*, p. 6.

subsequent acts or omissions by the person affected. Where the legislature has the power to invoke the administrative process—as it has with respect to deportation—such criminal legislation has not been deemed invalid because the crimes peculiarly associated with the specific status, liability, or duty may thus indirectly rest upon the original administrative determination. For example, a person denied a driver's license could not lawfully take it into his own hands to drive without a license because the denial was by an administrative body and he was of the view that the denial of his application was unlawful. The same is, of course, true of other licenses. Similarly, hundreds of thousands of draft classifications have been established by administrative determinations, and the refusals to comply with the requirements of the classifications have been made crimes by statute. The validity of the legislation has been upheld (*Cox v. United States*, 332 U.S. 442, 453), even though the sole permitted inquiry as to the classification is, as here, a review by the court to determine whether the administrative body properly exercised its functions so that, as a matter of law, its action in creating the status had legal validity. Freight tariffs and price controls by administrative bodies—which are not reviewed by the jury in the criminal case—have also repeatedly been upheld as the foundation for criminal charges. *Armour Packing Co. v. United States*, 209 U.S. 56, 81; *United States v. Adams Express Co.*, 229 U.S. 381, 388; *Yakus v. United States*, 321 U.S. 414, 444-445. In short, there is no constitutional objection to the imposition of duties or consequences, enforced by criminal sanctions, in connection with administrative findings, rulings, or decisions—if those administrative determinations are reviewable by the courts.

Wong Wing v. United States, 163 U.S. 228, relied upon in the *Spector* dissent, *supra* (343 U.S. at 174), affords enlightening contrast, rather than support for petitioner's position. Under the statute involved in *Wong Wing*, the question of whether an alien willfully violated regulations was never to reach a court, but was to be decided entirely by a commissioner. The mere entry of an order of unlawful residence resulted, under the statute, in virtually automatic and immediate imposition of imprisonment and "infamous punishment at hard labor" (163 U.S. at 237). No judicial review of the administrative order was provided.

There is a clear and fundamental difference between a provision under which an administrative finding automatically imposes punishment, and statutory provisions, as in the instant case, properly granting authority for the administrative determination of liability or status (with provision for court review); then imposing duties relevant to that liability or status, and providing for criminal punishment only upon a judgment in a criminal trial that the specific duties have been willfully violated. The latter type of statute—which is the type in this case—has often been used in American law, both federal and state.*

2. Petitioner argues that he could not have been guilty of a failure to depart since he was also convicted of failure to make timely application for travel documents, and absent these documents it would have been impossible for him to depart. The contention ignores

* In the five years since the *Spector* dissent, no court has adopted the broadest segment of its reasoning, although the position has been urged as grounds for challenging statutes imposing duties on deportable aliens *see e.g., Nakh v. Shaughnessy*, No. 29 O. T. 1955, Appellants' Br. 20-22; *United States v. Wathovich*, No. 295, this Term, Appellee's Br. 19-22).

the objectives patent upon the face of the Act, which lists individual offenses separated by the disjunctive "or." One obvious purpose of imposing a duty to make timely application for documents was to avoid or minimize the necessity of the government's having to expend time and effort to get the departure under way.⁹ Moreover, it was known that personal efforts of the alien to obtain documents were sometimes more likely to be successful (especially with some countries) than efforts of the United States government. As observed by the Commissioner of Immigration at the congressional hearings, aliens often could arrange to leave the United States even when their governments had refused to issue travel documents at the request of the United States. Hearings on H.R. 10, before Subcommittee 1, House Judiciary Committee, 81st Cong., 1st Sess., p. 9. And see H. Rep. No. 1192, 81st Cong., 1st Sess., p. 8; S. Rep. No. 2239, 81st Cong., 2nd Sess., p. 7; 96 Cong. Rec. 10675; Hearings on S. 1832 before Subcommittee on Immigration and Naturalization of Senate Judiciary Committee, 81st Cong., 1st Sess., p. 236. In short, the legislation was to give alien deportees, who would otherwise "make no effort to obtain the necessary papers," an "incentive to find a country which would be willing to have them" (96 Cong. Rec. 10453).

Petitioner's failure to apply anywhere was thus a separate offense, susceptible of subjecting the government to effort and expense and to eventual failure in deporting him. This offense might have been petitioner's only offense had the government succeeded in finding documents for him despite his own inactivity, or had

⁹ Petitioner was ordered to make monthly reports of his activities of this kind, and failed to comply in this respect, just as in the several respects for which he was indicted. See *supra*, pp. 7-8.

he simply returned to Canada as informally as he had entered the United States. • In short, the element of actual departure or non-departure was no part of the offense of failure to apply for travel documents.

On the other hand, the failure to depart is the decisive element of that separate offense. Assuming that it was impossible for petitioner to depart within six months because of his failure to apply for documents, that impossibility could be no excuse for failure to depart if he had created the impossibility as a means of preventing his departure. Had petitioner as willfully created for himself an impossibility of departure by means of an injury to himself or by a destruction of documents obtained by the government, this impossibility, like that in the instant case, would not only be the product of some other offense (*e.g.*, willful destruction of government papers) but also a step in the separate offense of failing to leave the United States. The single act of failure to make timely application can be an offense in itself and also a part or all of the different offense of complete failure to depart from the United States. *Morgan v. Devine*, 237 U.S. 632, 640; *Gavieres v. United States*, 220 U.S. 338, 342. The decision in *Prince v. United States*, No. 132, this Term, is not applicable here, under its own stated limitations resting upon the legislative history of that particular Act.

3. Petitioner also contends that the instant enactment is not applicable to him because it applies to a person ordered deported under "the Act of October 16, 1918, as amended (40 Stat. 1012; 41 Stat. 1008; 54 Stat. 673; 8 U.S.C. 137)," and petitioner's deportation was under an amendment enacted as part of the same legislation and cited as 64 Stat. 1010, which is not listed as an amendment in the parenthetical portion of the enactment.

This hyper-literal approach is unavailing. In the Internal Security Act of 1950 the amendment to add Communist Party membership as an additional ground of deportation appears at 64 Stat. 1006, and specifically states "The Act of October 16, 1918 * * * be, and the same is hereby, amended" to make Communist Party members deportable. The duty to depart appears at a later portion of the statute at 64 Stat. 1012, and its reference to "the Act of October 16, 1918, as amended" includes all prior amendments. The omission of the citation from the parenthetical citation of prior amendments does not override the reference to the Act of 1918 "as amended." The words "as amended" are controlling, and are not nullified by the failure to add, in a supplemental aside, a page reference to the amendment embodied in the same legislation.

That this is the normal and proper reading of the statute is attested by the experienced compilers of the United States Code. In Section 156(c) of 8 U.S.C. (1946 ed., Supp., IV) the penalty for failure to depart is imposed upon "Any alien against whom an order of deportation is outstanding under (1), section 137 to 137-8 of this title * * *". In turn, Section 137-3, in conjunction with Section 137(2)(c), provides for deportation on the basis of Communist Party membership. The same interpretation appears in Supplement V of the 1946 Code, and in the present legislation (8 U.S.C. (1952 ed.) 1251(a)(6)(C)(i), 1252(c)).

Over and beyond the literal incorrectness of petitioner's suggestion, the purposes of the legislation demonstrate its proper construction. The provision for deportation of members of the Communist Party was added in order to close the loopholes in the earlier,

more general, provisions with respect to deportation of subversive aliens. S. Rep. No. 2369, 81st Cong., 2d Sess., p. 10. "It is unthinkable that an enactment to assure prompt departure of subversives from the United States—a provision referring to "subversives" in specific language elsewhere in the same sentence—was ever intended to exclude Communist Party members merely because one citation of an amendment was omitted in a parenthetical citation of amendments accompanying the controlling language, "the Act * * * as amended." ³ 4"

4. (a). Another of petitioner's contentions is that the instructions by the trial judge directed the jury to convict him without proof of willfulness or intent (Pet. 19). The point is answered by the instructions themselves. The charge first included verbatim quotation of the indictment and statute, embodying the word "willfully" no less than four times (R. 164-165). The judge then instructed:

The law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can be neither justified nor excused on the ground of innocent intent.

³ The reports of the congressional committees at no point indicate any limitation of the phrase "as amended" to any specific amendments. See S. Rep. No. 2369, 81st Cong., 2d Sess., pp. 10, 12, 14; H. Rep. No. 3112 (Conference Report), 81st Cong., 2d Sess., pp. 54, 56, 60. If the citations of amendments had truly been intended as anything more than a parenthetical—and careless—bit of assistance, language would surely have appeared in the reports indicating why certain subversives were required to depart but Communist Party members, who were then the main focus of interest, were to be left unaffected.

Before you may find the defendant guilty on Count One of the indictment, you must be satisfied from the evidence beyond all reasonable doubt that he, during the period of six months from April 9, 1952, did *willfully* fail to depart from the United States.

Before you may find the defendant guilty on Count Two of the indictment, you must be satisfied from the evidence beyond all reasonable doubt that he, during the period of six months from April 9, 1952, did *willfully* fail to make timely application in good faith for travel or other documents necessary to his departure from the United States. [R. 166; emphasis added.]

* * * * *

You are instructed that the statute on which this indictment is laid, to-wit, Section 156(c), Title 8, United States Code, the material parts of which I have read to you, places upon an alien against whom an order of deportation is outstanding, an affirmative duty and an obligation on his part to take specific steps toward effecting his own departure from the United States, and to that end to make timely application for travel or other documents necessary to such departure. It is the alien's *willful* failure in that regard to fulfill such duty and obligation that is the gist of the offenses here charged.

"Willful" as used in this statute, means *an intentional failure and refusal to comply with the order of deportation*.

There is no duty on the part of the Government to assist the defendant in effecting his departure.

The Government will, if requested, assist him. But the duty devolves upon the defendant to comply with that order of deportation.

As I say, the material parts of the statute I have read to you place upon an alien against whom an order of deportation is outstanding, an affirmative duty or obligation on his part to take specific steps toward effecting his own departure from the United States. In other words, he can't remain idle. He must take the necessary steps to effect his departure from this country within that period of six months. And if he fails to do so, he has violated the law and the statute involved in this case. [R. 167-168; emphasis added.]

Under these instructions, the jury understood that in order to hold petitioner guilty it must first conclude that his failure to apply for documents and to depart was willful.

(b). Petitioner's argument really is that the evidence does not show willfulness, because "according to his testimony" petitioner understood that the Immigration and Naturalization Service was procuring the documents for him (Pet. 20).

First, it is to be borne in mind that petitioner gave no "testimony." He did not take the stand. His claims of misunderstanding appeared indirectly in a statement made to an Immigration and Naturalization Service investigator, sworn to by petitioner but not subject to cross-examination or to the personal appraisal of the jury. As against this, the evidence was undisputed that petitioner had received a notification from the Service, introduced in full in the record (R. 74-75) and clearly showing the distinction between the govern-

ment's efforts to obtain travel documents for him, and the independent statutory duty directly imposed upon him to take steps as well. See *supra*, p. 7. The letter referred to government arrangements being made to effect the deportation, stated that there would be notification of when and where petitioner should present himself for deportation, and noted that there would be a penalty for failure to comply. But the letter continued with a full recital of the statute, with its imposition of a penalty not only upon *refusal* to make timely application for documents and to depart, but also upon *failure to do so*. And the last paragraph specifically stated (R. 75):

Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950.

The jury could properly conclude from this letter that petitioner was amply advised of his own responsibility to proceed, irrespective of concurrent government efforts in the same direction.

In addition, the jury had before it the testimony of the government witnesses that in their interviews with petitioner there had been nothing whatsoever to cause petitioner to assume that possible government efforts to get petitioner out of the United States were to absolve petitioner of his own duty, imposed directly upon him by the statute. Upon the basis of the direct testimony of these witnesses, the jury could well disbelieve, as mere self-serving excuses and stalling, the petitioner's

assertions to a government investigator that he (petitioner) had assumed that he could with impunity fail to act and allow the government to carry out petitioner's statutory duty. Petitioner was no unschooled, bemused recent immigrant; he was a literate man of mature years who had lived the past 46 years in Canada and the United States and was, at the time, associate editor of a newspaper published in the Finnish language in Wisconsin. He was a citizen of Canada and could have obtained the simple travel documents to return to Canada, well before that country, at a later time, expatriated him.

In sum, the record clearly presented to the jury sufficient objective evidence from which the jury could reasonably conclude that petitioner understood his duty to obtain documents and to leave the United States, but chose instead to stall and to chance the possibility of avoiding the penal consequences of his conduct.

5. The foregoing discussion of the evidence likewise disposes of petitioner's further contention that he was convicted upon his own uncorroborated "confession." Petitioner made no confession. The fact that he failed to obtain documents and failed to leave the United States was at no point in dispute. The only real issue was whether he acted willfully—whether he understood that he was himself under the duty to take these steps. The evidence on this question was developed by the direct testimony of government witnesses. Far from being evidenced by petitioner's statement to the Service investigator, it was denied by petitioner at every point. The conviction rested upon disbelief in petitioner's statement, and belief in the testimony of the government witnesses, rather than upon the disclosures in petitioner's statement.

6. Petitioner's final contention that the court's sentence "failed to take the statute's suspension provisions into account" and violated the statute's "policy" of mercy (Pet. 23) is not valid on the facts of the case. The statute's proviso (*supra*, p. 4) that the judge "may" suspend sentence imposes no mandate to suspend. Moreover, the judge was aware of the available discretion, for he did suspend sentence on one of the counts (R. 180). The discussion at the time of sentence discloses a clear basis for the judge's refusal to suspend sentence on the other count; the judge pointed out the following (R. 174-176):

The Court: * * * [A]t one time this defendant had offered to him—this Court offered this defendant after he was indicted the opportunity to leave the country. He was then a citizen of Canada, and he could have gone to Canada at that time. But he refused that permission of the Court, and he just insisted upon staying.

He has been in this country for all these years; he never became a citizen. While he was in this country he left, according to the record in this case, according to the deportation proceedings, he went back to Russia, he was over there for about three years, learning all he could about Communism; and then he came back here as one of their agents. He came back here without a passport. He left the country, and he came back and came in and went out without passports.

He is the editor of a paper. He is an intelligent man. He knew what he was doing. * * *

* * * I feel that he has simply defied the law—he has set himself up above the law. He just made

up his mind that he was a little higher than the law of this country, and that he didn't have to obey it. Well, he is going to obey the law.

It is the judgment of the Court that this defendant be sentenced to the custody of the Attorney General on Count One for a period of five years.

It is the further judgment of the Court that, on Count Two, the imposition of sentence be suspended until the termination of his sentence on Count One; and then, if he makes an application and makes an honest effort to leave this country and to comply with that order of deportation, then the Court will determine what it will do on Count Two of this indictment.

* * * * *

* * * After he has completed the termination of the sentence on Count One, but at any time during that time he can make his application; but he will serve the sentence on Count One, and then I am suspending the imposition of sentence on Count Two until I determine whether or not he has made an honest application and an effort to leave this country and to comply with that order.

* * * * *

* * * [I]f within the last six months of the term imposed in the sentence of Count One, which is the five years—within that last six months if he makes application to deport himself from this country, then the Court will determine what it will do on Count Two. If he gets out of the country, most likely I will dismiss it. I will put him on probation, possibly, until he has an opportunity to get out of the country.

CONCLUSION

For the above reasons, it is respectfully submitted that the decision of the court below is correct and that the petition for a writ of certiorari should be denied.

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JOHN T. PEY, Clerk

No. 89

In the Supreme Court of the United States

OCTOBER TERM, 1957

KNUT EINAR HEIKKINEN, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,

Solicitor General,

WARREN OLNEY III,

Assistant Attorney General.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 89

KNUT EINAR HEIKKINEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 217-228) is reported at 240 F. 2d 94.

JURISDICTION

The judgment of the Court of Appeals (R. 229) was entered on January 17, 1957, and a petition for rehearing was denied on February 4, 1957 (R. 229). The petition for a writ of certiorari was filed on March 6, 1957, and was granted on April 22, 1957 (R. 230, 353 U. S. 935). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 20 (c) of the Immigration Act of 1917, as amended in 1950—imposing criminal

penalties upon an alien ordered deported who shall "willfully" fail to depart from the United States within 6 months or who shall "willfully" fail to make timely application for travel documents—is unconstitutional because it does not provide for a jury retrial of the administrative determination that the alien is deportable.

2. Whether the 1950 statute, imposing penalties on one ordered deported under the 1918 Act "as amended", is inapplicable to petitioner because parenthetical citations of the amendments to the 1918 Act, as set forth in the 1950 enactment, did not cite the 1950 amendment to the 1918 Act.

3. Whether the trial court's instructions on willfulness were correct, and whether the evidence warranted a finding of willfulness.

4. Whether the offense of willful failure to depart is excused where the impossibility of departure is created by the alien's own additional offense of willful failure to apply for the necessary travel documents.

5. Whether there was any abuse of discretion in the sentence.

STATUTES INVOLVED

Section 20 (c) of the Immigration Act of February 5, 1917, as amended (39 Stat. 890, 57 Stat. 553, 64 Stat. 1010; 8 U. S. C. (1946 ed., Supp. IV) 156 (c)), provided in pertinent part: .

Any alien against whom an order of deportation is outstanding under (1) the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 8 U. S. C. 137); (2) the Act of February 9, 1909, as amended (35 Stat. 614, 42 Stat. 596; 21 U. S. C. 171, 174—

175); the Act of February 18, 1931, as amended (46 Stat. 1171, 54 Stat. 673, 8 U. S. C. 156a); or (4) so much of section 19 of the Immigration Act of 1917, as amended (39 Stat. 889-890; 54 Stat. 671-673, 56 Stat. 1044; 8 U. S. C. 155) as relates to criminals, prostitutes, procurers or other immoral persons, anarchists, subversives and similar classes, who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of the Subversive Activities Control Act of 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: *Provided*, That this subsection shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: *Provided further*, That the court may for good cause suspend the sentence of such alien and order his release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify

releasing the alien, the court shall take into account such factors as (1) the age, health, and period of detention of the alien; (2) the effect upon the national security and public peace or safety; (3) the likelihood of the alien's following a course of conduct which made or would make him deportable; (4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States; (5) the reason for the inability of the Government of the United States to secure passports, other travel documents, or deportation facilities from the country or countries to which the alien has been ordered deported; and (6) the eligibility of the alien for discretionary relief under the immigration laws.

Sections 1 and 4 (a) of the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 64 Stat. 1006; 8 U. S. C. (1946 ed., Supp. IV) 137, 137-3 (a)), provided in pertinent part:

[Sec. 1]. That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * * * *

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political

Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt. * * *

* * * * *

Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

STATEMENT

Petitioner challenges the decision of the Court of Appeals for the Seventh Circuit (R. 229) affirming the judgment of the District Court for the Western District of Wisconsin (R. 179-180), upon the verdict of a jury (R. 179), finding petitioner guilty of willful failure to depart from the United States within six months of the entry of an order of deportation (Count One, R. 1-2) and willful failure to make

timely application for travel or other documents necessary to his departure within that six months period (Count Two R. 2). The pertinent part of the record may be summarized as follows:

Petitioner is an alien born in Finland in 1890. He emigrated to Canada in 1910 and acquired Canadian citizenship. He was admitted to the United States for permanent residence in 1916. Subsequent to 1928, he made numerous departures from and re-entries into the United States without the required travel documents. From 1923 to 1930, he was a member of the Communist Party while in the United States. He spent approximately three years, from 1932 to 1935, in the Soviet Union, returning to the United States in 1935 (R. 174-175, 217-218).

Deportation proceedings were brought against petitioner on the ground of his membership in the Communist Party. The finding of deportability by the Hearing Officer in the deportation proceedings, dated May 4, 1951 (R. 58, 70), was affirmed by the Assistant Commissioner on October 8, 1951 (R. 58, 70), and by the Board of Immigration Appeals (R. 71). It provided for deportation under the Act of October 16, 1918, as amended, because of petitioner's prior membership in the Communist Party (R. 70-71).

On April 30, 1952, the Immigration and Naturalization Service Officer-in-Charge at Duluth, Minnesota,

¹ The deportation proceedings, upon extensive review by the trial judge, were found valid as a matter of law (R. 47, 63-68, 152, 163, 166-167), and this conclusion is not challenged in the questions here presented which relate, instead, to petitioner's contention that a *jury* retrial of the issue of deportability is essential to constitutionality.

7

notified petitioner by registered mail at Superior, Wisconsin, where petitioner resided, that an order directing his deportation had been entered on April 25, 1952 (R. 73-75, 77-78). In this notice, it was stated that arrangements were being made to effect the deportation and, when those were completed, petitioner would be notified when and where to present himself for deportation. The notice continued with a setting forth of the statutory imposition of a penalty upon an alien guilty, *inter alia*, of willful failure or refusal to depart from the United States within six months or to make timely application for necessary travel documents, and concluded with the warning (R. 75):

Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950.²

At the time of this notice, petitioner was associate editor of a newspaper printed in the Finnish language at Superior, a city located "practically together" with

² The text of the letter was as follows, the brackets indicating words not read to the jury (R. 74-75; Ex. 6):

"An order, of which you have been notified, directing your deportation from the United States was entered on April 25, 1952, on the following grounds:

"The Immigration Act of May 26, 1924, in that, at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder; and

"The Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class set forth in

Duluth; where the field office of the Immigration Service was located (R. 78-79).

At the trial, the Officer-in-Charge of the Duluth office testified that petitioner failed to depart (R. 84). The officer did not know, and would not necessarily know, of any steps by the government to obtain travel documents (R. 82-83). He testified that a

Section 1 of said Act: An alien who was a member of the Communist Party of the United States.

"Arrangements to effect your deportation pursuant to such order are being made and when completed you will be notified when and where to present yourself for deportation.

"In this connection you are reminded that Section 23 of the Internal Security Act of 1950, which was enacted by Congress on September 23, 1950, declares that any such alien 'who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of that Act 'whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony [and shall be imprisoned not more than ten years]. Provided, that this subsection shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: * * *

"Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950."

Canadian passport was presented to petitioner after the six months' period; that petitioner could have proceeded to Canada;³ and that petitioner's Canadian citizenship was not terminated until after the six months' period for petitioner's departure (R. 85-87). The Officer-in-Charge also testified that he had directed a subordinate, Maki, to obtain, during the six months' period after the entry of the final deportation order against petitioner, "data concerning his birth and so forth" for the file, to be sent to the District Director of the Immigration and Naturalization Service at Chicago (R. 88-89).

Maki testified that on or about April 18, 1952, he interviewed petitioner for data to be recorded on a passport data form (R. 126). Maki informed petitioner that the form would be sent to Chicago to be considered by the Service with a view toward the Service's obtaining travel documents, which it sometimes did (R. 128, 138-139, 144-145), but he also testified that the obtaining of the information did not necessarily mean that the Service would follow through and obtain or attempt to obtain travel documents (R. 129). Maki said nothing to petitioner to indicate that the government would apply anywhere for a passport. He was in no position to do so. (R. 130-135, 140-142.)

John J. Boldin, an investigator for the Immigration and Naturalization Service, testified that when the six months' period expired in October 1952, and peti-

³Only nominal additional papers apparently would have had to be obtained. See R. 140-141.

tioner, pursuant to the statute,⁴ was placed under the supervision thereafter required, Boldin inserted in the supervision order a provision requiring petitioner to report on his efforts to effect departure from the United States (R. 122). Petitioner did not comply with this provision of the order of supervision and at no time reported such efforts (R. 122).

Boldin further testified that on February 12, 1953, he interviewed petitioner with respect to his failure to comply with the notice of April 30, 1952, requiring departure from the United States by October 25, 1952 (R. 93-94, 99, 101). The questions and petitioner's answers were transcribed at the time into a statement sworn to and signed by petitioner, and introduced in evidence at the trial (Ex. 8; R. 94-95). In his answers, petitioner asserted that he had understood from his prior interview with Maki that the government, and not he (petitioner), would obtain the travel documents and that petitioner would not need to do anything until he heard from the government (R. 102-106). He admitted that he had never received a request from the government to execute any passport application and that he had "been wondering about that myself" (R. 104).

The trial judge instructed the jury *in extenso* on the required element of willful intent (see the Argument, *infra*, pp. 26-27). He refused petitioner's request to instruct that petitioner's continued presence in the United States was not "evidence" of guilt,

⁴ Section 23 of the Internal Security Act of 1950, 64 Stat. 1010, now included in Section 242 of the Immigration and Nationality Act of 1952, involved in *United States v. Witkovich*, 353 U. S. 194.

stating that it "is not proof of his guilt, but it is evidence" (R. 157).

Petitioner was sentenced to five years' imprisonment on the first count (R. 180). On the second count, imposition of sentence was suspended until after service of the sentence imposed on the first count (R. 180), the trial court indicating probable grant of probation for time in which to effect departure if petitioner then made a genuine effort to depart (R. 175-176).

SUMMARY OF ARGUMENT

I

Petitioner contends that the instant enactment is unconstitutional because it does not afford, *inter alia*, a jury trial of the question whether petitioner committed the acts upon which he was ordered deported. The contention misconceives the nature of the statute, which in no sense punishes the acts for which petitioner was ordered deported but comes into effect only after the administrative proceedings to determine deportability have been completed and petitioner's status of deportability established. Thereafter, if petitioner willfully refuses to abide by the result of the deportation proceedings—if he willfully fails to depart from the United States or willfully fails to make timely application in good faith for travel documents—he is subject to penalty, as is the case in many instances of the violation of proper administrative orders that are not based upon jury verdicts, *e. g.*, denial of licenses, selective service

board classifications, Interstate Commerce Commission rate findings, and the like.

Petitioner was accorded a full jury trial as to whether he willfully failed to seek travel documents and willfully failed to depart. Moreover, he was accorded a thorough review, by the trial judge, on the question of whether the administrative proceedings in which he was held to be a deportable alien were valid⁵—thereby making inapplicable the basic premise of the dissent in *United States v. Spector*, 343 U. S. 169, 174 (upon which petitioner places such reliance), which assumed that there would be no judicial review of the deportation order. Accordingly, the statute, as applied here, was clearly within the established and familiar concept in criminal law that a status—as here, deportability—may be established administratively, and may thereafter be flouted only at the risk of criminal consequences. The inquiry in the criminal trial is not a retrial of a completed civil determination, but is addressed only to the question whether a law imposing certain duties upon a person in a specific civil status has been willfully disobeyed. It is this criminal disobedience that is the subject of jury trial.

II

Petitioner contends that the statute does not apply to him because it refers to a person ordered deported under “the Act of October 16, 1918, as amended (40 Stat. 1012; 41 Stat. 1008; 54 Stat. 673; 8 U. S. C. 137),” and petitioner was found deportable under the

⁵ In this Court, petitioner does not challenge the validity of the deportation order.

1950 amendment to the 1918 Act, printed at 64 Stat. 1010. The answer is that the amendment under which petitioner was found deportable was made in a section of the same statute here involved—Section 22 amended the 1918 Immigration Act to make members of the Communist Party deportable, and Section 23 required their departure. At the time of the enactment, of course, there was not yet an available citation in the statutes-at-large to be printed later (64 Stat. 1010), but the absence of this parenthetical citation does not negate the controlling effect of the language “the act of October 16, 1918, *as amended* (emphasis added).” At the time when Section 23 (the departure provision) came into effect, the 1918 Act was amended to cover the deportation of Communist Party members. And the legislative history of the enactment supports this construction.

III

The trial court's instructions placed the issue of willfulness before the jury and the evidence warranted the jury's finding of guilt. Petitioner, who did not take the stand, argues that the jury should have believed that he thought the government would obtain the travel documents for him and that he had no duty under the statute until he was furnished documents by the government. The argument is based, in essence, upon one paragraph of a government notice of the deportation order and upon petitioner's later self-serving statements to a government investigator in which petitioner sought to excuse his non-performance by expressing the belief that the government was first

to obtain documents for him, and that he was not required to take any action.

As against the foregoing, the jury had before it (1) the terms of the notice for the jury's own appraisal of whether it contained any real ambiguity that would confuse a person sincerely intent upon compliance, and the jury also had before it (2) the evidence that petitioner could have resolved any ambiguity in the notice by inquiry at the nearby office of the Immigration Service, (3) the testimony of government witnesses that nothing had been said to lead petitioner to assume that possible efforts the government might itself make to deport him would absolve him of his own duty imposed directly by statute, (4) testimony that a Canadian passport had been presented to petitioner (after the six months' period) upon which he could have proceeded with only nominal additional papers, and that he did not use this passport although there was time to do so, and (5) evidence that after direct notification to petitioner (after the six months' period) that he could not merely await government action and must make periodic reports of his own efforts to obtain travel documents, he still made no reports of any such efforts.

—The jury could properly conclude that petitioner, an experienced, literate, mature man, was not confused by the original notice or any earlier interview but was willfully choosing every possible delay and eschewing sincere effort at compliance, thereby testing the outermost limits of possible escape by means of later excuses.

The foregoing evidence also disposes of petitioner's contention that he was convicted on the basis of his own uncorroborated "confession." Petitioner made no confession, and he did not take the stand. The fact that he failed to depart was at no point in dispute. The evidence on the only real issue at the trial—as to whether he truly thought he was under no duty to do anything until he heard from the government—was developed in the direct testimony of the government's witnesses. Far from being evidenced by petitioner's statement to the Immigration Service investigator (which petitioner calls his "confession"), such willfulness was denied by petitioner at every point in that statement. The conviction rested, not upon petitioner's self-serving effort at excuse, but upon the jury's obvious disbelief in the excuses in the light of the circumstances attested by the government witnesses.

IV

Petitioner seeks to treat both the failure to depart and the failure to seek travel documents as a single offense. This misconceives not only the statutory language—which clearly employs the disjunctive "or"—but also the separate evils involved and referred to in the legislative history. The statute specifies four offenses, each embodying a separate evil: (1) willful refusal *or failure* to depart, "or" (2) willful refusal *or failure* to make timely application for necessary travel documents, "or" (3) connivance or action to hamper departure, "or" (4) willful refusal *or failure* of the alien to present himself for deportation at the time and place required by the

Attorney General. Petitioner was convicted of the first two offenses. The first offense, the failure to depart, embodies the evil of continued presence in the United States after it has been validly determined that such continued residence is detrimental or dangerous. That offense may be committed without involving the second offense of failure to apply for documents, since documents may be obtained by the government, or may be unnecessary in a given case, and yet the alien may elude the government at the last moment and fail to depart. But when the alien also fails to take the laboring oar of obtaining the necessary documents, he not only continues a detrimental or dangerous presence in the country, but also subjects the government to effort and expense and to a possibility—as the legislative history demonstrates—of outright failure to obtain documents at all. Accordingly, petitioner's second offense involved an additional and different type of injury to the United States and was properly the subject of separate indictment and conviction.

V

Petitioner's attack upon the sentence, as "savage" and as ignoring the statutory provisions permitting the judge to suspend sentence, is answered by the fact that the trial judge, at the time of sentencing, while specifically advertng to factors of special willfulness on the part of petitioner, did actually suspend sentence as to one of the counts. Moreover, the sentence was for five years, far short of the permissible 10 years, thus posing no situation of a sentence "so severe and the offense so trivial" as to warrant setting

aside by this Court. *Kawakita v. United States*, 343 U. S. 717, 745.

ARGUMENT

I

CONGRESS MAY CONSTITUTIONALLY IMPOSE PENALTIES, SUBJECT TO TRIAL BY JURY, UPON ALIENS ORDERED DEPORTED WHO FAIL TO COMPLY WITH CERTAIN STATUTORY REQUIREMENTS EVEN THOUGH THE STATUS OF DEPORTABILITY IS DETERMINED IN ADMINISTRATIVE PROCEEDINGS SUBJECT TO REVIEW BY THE COURT ALONE

Petitioner was accorded a full trial by jury as to whether he committed the offenses upon which the instant statute imposes a penalty, *i. e.*, whether he willfully failed to make timely application for travel documents necessary to his departure from the United States, and whether he willfully failed to leave the United States within six months of the deportation order. Moreover, at the trial, the administrative proceeding which resulted in the order of deportation was fully reviewed by the trial judge in accordance with the prior decision of the Court of Appeals in *United States v. Heikkinen*, 221 F. 2d 890 (C. A. 7). Petitioner does not argue that, if the statute under which he was order deported is constitutional,⁶ the deci-

⁶The constitutionality of the Internal Security Act of 1950 providing for the deportation of any alien who had been after entry a member of the Communist Party was upheld in *Galean v. Press*, 347 U. S. 522. There is no claim that petitioner was merely a "nominal" member of the Party within the exception noted in *Galean*, nor could there be in the face of his extensive activities in the Party. The case is thus materially different from *Rowoldt v. Perfetto*, No. 5, this Term, where the assertion is that Rowoldt was a nominal member of the Party.

sion upholding the deportation order is erroneous.⁷ The contention is that the statute is rendered unconstitutional by the fact that the validity of the deportation order is not passed upon by the jury.

The argument rests upon an assumption that the offense consists of two elements—first, the act upon which the deportation order is based, and, second, the failure to apply for documents or to depart—and that both elements must be found against a defendant by the jury. This assumption is fundamentally in error. The offense does not consist in being declared deportable or in doing the act for which the alien is to be deported, but rather in certain willful conduct on the part of an alien against whom a valid order of deportation is already outstanding. The order of deportation must of course be a valid one, but the crime is action or non-action by the alien subsequent to, and quite separate from, the deportation proceeding. The act which is the ground for deportation may or may not be some criminal offense of another type. But in any event it is not an integral part of the instant criminal offense. An alien to whom the statute applies may remain in the United States for years without violating this statute, so long as he does not “willfully” fail to take measures toward departure. Conversely, when there is willful flouting of the law,

⁷ In the Court of Appeals below, petitioner contended that the record of the deportation proceedings examined by the trial judge was defective and that petitioner was deprived of his right to counsel in the deportation proceedings by reason of failure to grant further continuances or to move the proceedings from Duluth to New York. The Court of Appeals considered these contentions at length and found them without merit (R. 220-223). Petitioner has not pursued these contentions before this Court.

the criminal trial of this specific offense is not the proper occasion for a collateral re-trial, by a jury, of civil issues properly determined, previously, in the administrative proceeding.

The dissenting opinion in *United States v. Spector*, 343 U. S. 169, 174, on which petitioner relies, assumed that a narrow interpretation of the Act would be employed, *i. e.* (343 U. S. at 177) :

Production of an outstanding administrative order for his deportation becomes *conclusive* evidence of his unlawful presence and a consequent duty to take himself out of the country, *and no inquiry into the correctness or validity of the order is permitted.* [Emphasis added.]

The difficulty envisaged by that statement is met by the interpretation (adopted below) that there is judicial review, although not by the jury, of the administrative proceeding at the trial in order to determine that the status of deportability was validly created. See *supra*, pp. 17-18. Moreover, in its citation of *Wong Wing v. United States*, 163 U. S. 228, the *Spector* dissenting opinion fails, we submit, to give adequate weight to the factor of willfulness in this statute and the necessity that willfulness be found by a jury. Under the statute involved in *Wong Wing*, the question of whether an alien willfully violated regulations was never to reach a court, but was to be decided entirely by a commissioner. The mere entry of an order of unlawful residence resulted, under that statute, in virtually automatic and immediate imposition of imprisonment and "infamous punishment at hard labor" (163 U. S. at 237). No judicial review at

all of the administrative order was provided or contemplated. Here, not only is there judicial review of the administrative proceeding, but there can be no penalty until a jury finds that failure to depart or failure to take the other requisite measures is willfully done. The administrative finding in the deportation proceeding does not result in punishment. The defendant's willful act after the administrative finding, as found by the jury, is the basis of punishment. There is a fundamental difference between a provision under which an administrative finding automatically imposes punishment, and statutory provisions, as in this case, properly granting authority for the administrative determination of liability or status (with provision for court review), then imposing duties relevant to that liability or status, and providing for criminal punishment only upon a judgment in a criminal trial that those specific duties have been willfully violated.

It is an established and familiar concept in criminal law that a status, liability, or duty may be established administratively, to be followed by criminal consequences in the event of subsequent acts or omissions by the person affected. Where the legislature has the power to invoke the administrative process—as it has with respect to deportation—such criminal legislation has not been deemed subject to challenge on the ground that the crimes associated with the specific status rest upon the original administrative determination. For example, a person denied a driver's license could not lawfully take it into his own hands to drive without a license because the denial was by an administrative body and he was of the view that the

denial of his application was unlawful. The same is, of course, true of other licenses and other statuses determined by administrative action. An important situation analogous to the present case is presented by selective service prosecutions. Hundreds of thousands of draft classifications have been established by administrative determinations, but the refusals to comply with the requirements of those classifications have been made crimes by statute. The validity of this pattern was upheld in *Cox v. United States*, 332 U. S. 442, 453, where this Court observed:

* * * The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order. * * *

Freight tariffs or price controls established by administrative proceedings have long been upheld. In *Yakus v. United States*, 321 U. S. 414, 444-445, this Court stated:

* * * [W]e are pointed to no principle of law or provision of the Constitution which * * * precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.

For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates—including, since 1906, rates prescribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U. S. C. §§ 6 (7), 10 (1), *Armour Packing Co. v. United States*, 209 U. S. 56, 81; *United States v. Adams Express Co.*, 229 U. S. 381, 388. It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful, where its infirmity has not first been established by an independent proceeding before the Interstate Commerce Commission, and the denial of the defense in such a case does not violate any provision of the Constitution [citing decisions]. * * *

There is, accordingly, no constitutional objection to the imposition of duties or consequences on persons

⁸ Other illustrations are not wanting, of course, for the principle that, where criminal consequences follow from failure to comply with the duties and requirements flowing from a particular status which has been administratively determined, it is not for the jury to pass upon the validity of such requirements or status. For example, rulings by the Federal Communications Commission and the Civil Aeronautics Board, violations of which may result in criminal action, are reviewable solely by the courts (47 U. S. C. 402, 502; 49 U. S. C. 622, 646). See also, *e. g.*, 18 U. S. C. 835 (transporting explosives contrary to regulations promulgated by the Interstate Commerce Commission, see *Boyce Motor Lines v. United States*, 342 U. S. 337); 18 U. S. C. 41 (hunting and fishing not in compliance with rules and regulations adopted under authority of law); 18 U. S. C. 1383 (entering upon or otherwise violating restrictions applicable to a military area or zone).

in a status fixed by administrative proceedings; and the imposition of penalties for failure to perform these duties would be seriously impaired if the enforcement of these requirements were conditional, as to each penalty, upon a jury retrial of the civil issues theretofore determined in the administrative proceeding.*

II

PETITIONER, AS AN ALIEN REQUIRED TO BE DEPORTED UNDER THE "ACT OF OCTOBER 16, 1918, AS AMENDED," IS NOT ABSOLVED FROM DEPORTATION BY AN OMISSION FROM A PARENTHETICAL LISTING OF AMENDMENTS OF THE 1918 ACT

Petitioner contends that the 1950 enactment cannot be applied to him since it refers to a person ordered deported under "the Act of October 16, 1918, as amended (40 Stat. 1012; 41 Stat. 1008; 54 Stat. 673; 8 U. S. C. 137)," whereas he was ordered deported under the 1950 amendment to the 1918 Act printed at 64 Stat. 1010. The quoted language is from Section 23 of the Internal Security Act of 1950 which, in the immediately preceding Section 22, enacted the amendment to the Act of October 16, 1918, under which petitioner was ordered deported *i. e.*, the amendment adding Communist Party membership as an additional ground of deportation. Of course, the amendment

*Cf. *Maggio v. Zeitz*, 333 U. S. 56, to the effect that it would be improper to attempt to relitigate or correct a bankruptcy turnover order when it later became the basis of a contempt proceeding, despite the contention that the turnover order and subsequent imprisonment was based only upon ordinary evidence rules and not upon proof beyond a reasonable doubt (but see separate opinion of Mr. Justice Black and Mr. Justice Rutledge, 333 U. S. at 78-81).

effected by Section 23 did not have, at the time of enactment, any citation to a page in the statutes-at-large such as is cited for prior amendments in the parenthetical clause on which petitioner relies. But this does not mean that, when Congress spoke of persons deported under the Act of October 16, 1918 "as amended", it did not include an amendment then being contemporaneously enacted. Section 22 (64 Stat. 1006) specifically states: "The Act of October 16, 1918 * * * be, and the same is hereby, amended" (to make Communist Party members deportable). The duty to depart appears in the immediately subsequent Section 23 (64 Stat. 1012), and its reference to "the Act of October 16, 1918, as amended" patently includes all amendments including that embodied in the very same statute.

That the government's interpretation constitutes the normal reading is attested by the experienced compilers of the United States Code. The section is codified in Section 156 (c) of 8 U. S. C. (1946 ed. Supp. IV) as imposing a penalty for failure to deport "Any alien against whom an order of deportation is outstanding under (1), section 137 to 137-8 of this title * * *". In turn, Section 137-3, in conjunction with Section 137 (2) (c), provides for deportation on the basis of Communist Party membership. The same interpretation appears in Supplement V of the 1946 Code, and in the present legislation—the Immigration and Nationality Act of 1952 (8 U. S. C. (1952 ed.) 1251 (a) (6) (C) (i), 1252 (e)).

The purposes of the legislation likewise demonstrate its proper construction. The provision for de-

portation of members of the Communist Party was added in order to close the loopholes in the earlier, more general, provisions with respect to deportation of subversive aliens. S. Rep. No. 2369, 81st Cong., 2d Sess. p. 10. It is unthinkable that an enactment to assure prompt departure of subversives from the United States—a provision referring to “subversives” in specific language elsewhere in the same sentence (*supra*, p. 3)—was intended to exclude Communist Party members merely because one citation of an amendment was omitted in a parenthetical reference to “amendments accompanying the controlling language, “the Act * * * as amended.” The reports of the congressional committees at no point indicate any limitation of the phrase “as amended” to any specific amendments, and certainly not to the pre-1950 amendments. See S. Rep. No. 2369, 81st Cong., 2d Sess., pp. 10, 12, 14; H. Rep. No. 3112 (Conference Report), 81st Cong., 2d Sess., pp. 54, 56, 60. In sum, neither the language nor the legislative history supports petitioner’s contention.

III

THE TRIAL COURT’S INSTRUCTIONS ON WILLFULNESS WERE CORRECT, AND THE EVIDENCE WARRANTED A FINDING OF WILLFULNESS

A. THE INSTRUCTIONS ON WILLFULNESS WERE CORRECT

Petitioner contends that the instructions by the trial judge directed the jury to convict him without proof of willfulness or intent (Pet. Br. 31-34). The contention is answered by the instructions themselves.

The charge first included a verbatim quotation of the indictment and statute, embodying the word "willfully" no less than four times, and instructions on "reasonable doubt" (R. 164-165). The judge then instructed:

The law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can be neither justified nor excused on the ground of innocent intent.

Before you may find the defendant guilty on Count One of the indictment, you must be satisfied from the evidence beyond all reasonable doubt that he, during the period of six months from April 9, 1952, did *willfully* fail to depart from the United States.

Before you may find the defendant guilty on Count Two of the indictment, you must be satisfied from the evidence beyond all reasonable doubt that he, during the period of six months from April 9, 1952, did *willfully* fail to make timely application in good faith for travel or other documents necessary to his departure from the United States. [R. 166; emphasis added.]

* * * * *

You are instructed that the statute on which this indictment is laid, to-wit, Section 156 (c), Title 8, United States Code, the material parts of which I have read to you, places upon an alien against whom an order of deportation is outstanding, an affirmative duty and an obligation on his part to take specific steps toward effecting his own departure from the United States, and to that end to make timely applica-

tion for travel or other documents necessary to such departure. It is the alien's *willful* failure in that regard to fulfill such duty and obligation that is the gist of the offenses here charged.

"Willful" as used in this statute, means an intentional failure and refusal to comply with the order of deportation.

There is no duty on the part of the Government to assist the defendant in effecting his departure. The Government will, if requested, assist him. But the duty devolves upon the defendant to comply with that order of deportation.

As I say, the material parts of the statute I have read to you place upon an alien against whom an order of deportation is outstanding an affirmative duty or obligation on his part to take specific steps toward effecting his own departure from the United States. In other words, he can't remain idle. He must take the necessary steps to effect his departure from this country within that period of six months. And if he fails to do so, he has violated the law and the statute involved in this case. [R. 167-168; emphasis added.]

From the course of the trial, the jury understood that the only real issue in the case ~~was~~ whether petitioner knew that he had to go forward, himself, with the procurement of travel documents, or whether he sincerely believed that he could properly wait for the government to produce such papers. Under the instructions quoted above, the jury was apprised of the requirement that in order to hold petitioner guilty it must conclude that the first of these alternatives was his actual state of mind—

that his failure to seek travel documents and his failure to depart were willful and not innocent.¹⁰

B. THE EVIDENCE WARRANTED A FINDING OF WILLFULNESS.

Petitioner also urges (Pet. Br. 27-30) that the evidence does not show "willfulness," the basic conten-

¹⁰The cases cited by petitioner (Pet. Br. 27) disclose no insufficiency in the District Court's instructions concerning willfulness. *Felton v. United States*, 96 U. S. 699, is clearly distinguished by its showing of reasonable and extensive effort of certain distillers to comply with the statutory requirements as to equipment; it was held error to refuse an instruction that, if the inadequacy of equipment was "unknown" to the defendants, they were not liable (96 U. S. at 701, 704). *Spurr v. United States*, 174 U. S. 728, 736, 739, involved the refusal of a court to state to the jury the penal provision requiring *willful* violation of a statute prohibiting certification of a check when funds on deposit were insufficient; the judge was patently in error in stating that penal provisions were not for the jury's consideration. In *United States v. Murdock*, 290 U. S. 389, 396, a prosecution for withholding tax information, it was held error to refuse an instruction which would have permitted the jury to determine that the defendant asserted the privilege against self-incrimination in good faith and that, accordingly, information was not "willfully" withheld. In *Spies v. United States*, 317 U. S. 492, 495-497, 499, involving a willful attempt to evade tax, the Court relied upon the entire structure of the legislation as the basis for requiring something additional with respect to willfulness for the felony as distinguished from the willful misdemeanors. In the instant case, no such distinction is involved or is pertinent, as the statute lists four, equal, offenses. *Hartzel v. United States*, 322 U. S. 680, 687-689, held only that the diatribes against various races and against the President did not constitute evidence of the needed specific willful intent to foment insubordination in the armed forces. In *Screws v. United States*, 325 U. S. 91, 93, 107, the case of a fatal beating of a Negro whom the sheriff had threatened to "get," the instruction was held insufficient, not because of lack of requirement of a "generally" bad purpose, but for lack of a direction tying that purpose to the specific offense—to deprive of a constitu-

tion being that "[i]n his statement which was introduced into evidence" petitioner explained that he thought the Immigration Service was procuring the documents for him (Pet. Br. 28).

The statement by petitioner which was "introduced into evidence" was introduced by the government, for petitioner did not take the stand. The argument is really that the jury was required to find misunderstanding, on his part, from the form of notice to depart that he received, and from the excuses he offered in his transcribed interview with an Immigration Service investigator (*supra*, p. 10). As against this claim of misunderstanding, the jury had before it (1) the words of the notice itself (*supra*, pp. 7-8, fn. 2); (2) the fact that petitioner could have resolved any ambiguity in the notice by inquiry at the office of the Immigration Service at Duluth, which was "practically together" with the twin city of Superior, Wisconsin, where petitioner resided (*supra*, pp. 7-8) (R. 78);

tional right. *Ward v. United States*, 344 U. S. 924, was no ruling on instructions but a *per curiam* finding by this Court that the "record" did not support a charge of "deliberate purpose * * * not to comply with" the requirement of furnishing a correct address to the Selective Service Board. *Marissette v. United States*, 342 U. S. 216, 249-250, 273, involved a prosecution for stealing or "knowingly" converting government property. The trial judge refused to allow proof that the defendant thought the property had been abandoned and the Court of Appeals had ruled that knowing conversion required *no* element of criminal intent. By contrast, in the instant case, there was no barring of the indications of possible misunderstanding culled by petitioner from the government's evidence, and the instructions repeatedly embodied the requirement of "willful" disregard of the requirements that he obtain travel documents and leave the country.

(3) the testimony of government witnesses that nothing had been said to lead petitioner to assume that possible government efforts to deport him absolved him of his own duty, imposed directly by the statute (*supra*, pp. 9-10); (4) undisputed testimony that a Canadian passport had been presented to petitioner (after the six months' period) upon which he could have proceeded with only nominal additional papers; ¹¹ (5) evidence that after direct notification to petitioner (in his order of ~~supervision~~ ^{super}vision) that he could not merely await government action and must make periodic reports of his own efforts to obtain travel docu-

¹¹ Petitioner is in error in stating that the availability of Canada for petitioner's departure cannot support the verdict because it was on "incident" occurring after the 6 months' period of departure (Pet. Br. 36, fn. 11). Petitioner wrongly infers that he could not have departed to Canada *during* the 6 months' period. But the officer testified, "I had a Canadian passport that was presented to [petitioner], showing that he was a citizen and could have proceeded to Canada" (R. 85). While the exact date was not recalled, the officer firmly recalled that it was *after* the time within which petitioner was to obey the order to leave the United States (R. 87). Accordingly, since petitioner was still recognized as a citizen of Canada after the six-month period, he was *a fortiori* a Canadian citizen during the 6 months in which he was required to depart from the United States, and could therefore have gone to Canada during that time.

Petitioner is in further error in stating, in the same footnote, that "this incident occurred 'a considerable time after' the period covered by the indictment." What occurred "a considerable time after" was the time "when the passport was canceled" (R. 87), thereby again supporting the government's view of the actual chronology—that Canada's action to revoke petitioner's citizenship did not come until a considerable time after petitioner could still have gone to Canada, during the six months' period following April 1952, in compliance with his duty under the instant statute.

ments, he still made no such reports of any efforts (*supra*, pp. 9-10).

Weighing the text of the notice to depart against the foregoing evidence and against the undisputed fact that petitioner was a mature and literate man (*supra*, p. 7), the jury could properly conclude that petitioner was at no time confused by the notice or by his interview with the immigration representative. While the notice did refer to the government's efforts to obtain travel documents for petitioner, the major portion of the notice was addressed to the alien's own duties to proceed with effecting his departure. The notice directed attention, not alone to the offense of refusal to present one's self for deportation when the Attorney General had effected arrangements, but it also pointed out the penalty for the three further and distinct offenses of willful failure to depart, willful failure to make timely application for travel documents, and willful conspiracy to prevent or hamper the departure. The notice likewise embodied, in terms, the statute which clearly makes the distinction between *refusal* to make timely application for documents and *failure* to do so. And the last paragraph of the notice specifically stated (R. 75):

Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950.

The jury could properly conclude from this letter (and the testimony as to conversations with peti-

tioner) that he was amply advised of his own responsibility to proceed, irrespective of concurrent government efforts in the same direction; and—particularly in the light of the testimony of the government witnesses—the jury could well disbelieve, as mere self-serving excuses, petitioner's assertions to a government investigator that he, (petitioner) had assumed that he could do nothing, and allow the government to carry out his statutory duty. Petitioner was no unschooled, bemused recent immigrant; he had lived the past 46 years in Canada and the United States and was, at the time, associate editor of a newspaper published in the Finnish language in Wisconsin. He was a citizen of Canada and could have obtained the simple travel documents to return to Canada well before that country, at a later time, expatriated him. He was quite capable of understanding that the Immigration Service was not required to elect between the alternatives of (1) efforts by the government to obtain travel papers or (2) action by the alien. The statute, which was furnished to him, speaks in terms of a dual and unequivocal duty of the alien to make every reasonable effort to effect his own departure and to cooperate in government efforts to that end if and when the government takes successful action in that respect.

Petitioner was, of course, not required to take the stand but, conversely, he cannot complain of the refusal of the jury to accept as absolute fact his indirect and self-serving protestations of misunderstanding. The jury, on all the evidence, could well have concluded that petitioner knew his obligation but was

electing to gamble upon a possible ambiguity in the notice, in an attempt to portray himself as innocently confused. The jury could reasonably have believed that petitioner eschewed sincere efforts to obey the statute, choosing instead to chance the possibility of avoiding the penal consequences by later excuses of misunderstanding. In this view, his criminal involvement was not the product of ambiguities but of his own gamble in testing the outermost limits of the statute and the notice before him. As was said in *United States v. Wurzbach*, 280 U. S. 396, 399:

* * * Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. * * *

See also *Rence Motor Lines v. United States*, 342 U. S. 337, 340.

C. PETITIONER'S CONVICTION DOES NOT REST UPON HIS OWN STATEMENTS BUT UPON FACTS PROVED BY THE GOVERNMENT WITNESSES

The foregoing discussion of the evidence likewise disposes of petitioner's further contention that he was convicted upon his own uncorroborated "confession" (Pet. Br. 34-36). We have already stressed that petitioner made no confession. The fact that he failed to obtain documents and failed to leave the United States was at no point in dispute. The only real issue was whether he acted *willfully*—whether he understood that he was himself under the duty to take these steps. As shown in the preceding section

of this brief, the evidence on this question was developed through the direct testimony of government witnesses. Far from being evidenced by petitioner's statement to the Service investigator, it was denied by petitioner at every point. The conviction rested not upon petitioner's statement but upon disbelief in that statement, in the light of all the circumstances proved by the government witnesses who were believed. Petitioner is wholly wrong in saying that there was no evidence of guilt other than his statement.

IV

THE STATUTE SPECIFIES, AND PETITIONER COMMITTED, SEPARATE OFFENSES OF WILLFUL FAILURE TO DEPART FROM THE UNITED STATES PURSUANT TO THE DEPORTATION ORDER, AND WILLFUL FAILURE TO APPLY FOR TRAVEL DOCUMENTS

Petitioner contends that willful failure to depart and willful failure to obtain travel documents are separate offenses covering different contingencies, and that the former cannot exist in the presence of the latter (Pet. Br. 24-27). On this basis, he argues that the statute has been applied so as to multiply penalties for one action (Pet. Br. 24).¹² But his position clearly has no merit.

A. The two offenses, separated in the statute by the disjunctive "or", have different elements. An alien may depart informally, without travel documents. On the other hand, an alien may obtain travel documents and not depart. Each portion of the statute

¹² The court suspended imposition of sentence on the second count charging willful failure to apply for travel documents. *Supra*, p. 11.

thus punishes separate acts. And the legislative history shows, we think, that Congress intended each such act to be separately punished.

The purpose of imposing a duty to make timely application for documents was to avoid or minimize the necessity of the government's having to expend time and effort to get the departure under way. Moreover, it was known that personal efforts of the alien to obtain documents were sometimes more likely to be successful (especially with some countries) than efforts of the United States government. As observed by the Commissioner of Immigration and Naturalization at the congressional hearings, aliens often could arrange to leave the United States even when their governments had refused to issue travel documents at the request of the United States. Hearings on H. R. 10, before Subcommittee 1, House Judiciary Committee, 81st Cong., 1st Sess., p. 9. And see H. Rep. No. 1192, 81st Cong., 1st Sess., p. 8; S. Rep. No. 2239, 81st Cong., 2d Sess., p. 7; 96 Cong. Rec. 10675; Hearings on S. 1832 before the Subcommittee on Immigration and Naturalization of the Senate Judiciary Committee, 81st Cong., 1st Sess., p. 326.¹³ In short, the

¹³ H. Rep. 1192, 81st Cong., 1st Sess., p. 8; S. Rep. 2239, 81st Cong., 2d Sess., p. 7:

"The second case is that of Badrig Selian, 50, a native of Turkey. He is an active member of the Communist Party and one of their most important publicists in the United States. In 1930 his deportation was ordered but refused by Turkey and by Syria, which now controls his birthplace. Of his own free will he left the United States last year after the Government had failed throughout 18 years to get him out of the country. Concerning the Selian case the Attorney General says that—'this Communist declined to leave the

legislation was to give alien deportees, who would otherwise "make no effort to obtain the necessary papers," an "incentive to find a country which would be willing to have them" (96 Cong. Rec. 10453).

Petitioner's failure to apply anywhere was thus a separate offense, susceptible of subjecting the government to effort and expense and to eventual failure in deporting him. This offense might have been petitioner's only offense had the government succeeded in finding documents for him despite his own inactivity, or had he simply returned to Canada as informally as he had entered the United States. The element of actual departure or non-departure is no part of the offense of failure to apply for travel documents.

Conversely, the failure to depart is itself the decisive element of a separate offense. Assuming that it was impossible for petitioner to depart within six months because of his failure to apply for documents, that impossibility could be no excuse for failure to depart if he himself created the impossibility as a means of preventing his departure. Had petitioner

United States, and since no country of origin would take him we were obliged to permit him to remain here at large. When it suited his own purposes, however, he was able through his own efforts to obtain a passport."

96 Cong. Rec. 10675, Representative Hobbs:

"* * * although in one case 13 applications of your Government were turned down flat, cold, and then a few months later when the man himself applied he got it in 5 days."

Hearings on S. 1832 before the Subcommittee on Immigration and Naturalization of the Senate Judiciary Committee, 81st Cong., 1st Sess., p. 326:

"Attorney General Clark. * * *

"Since April 1, 1948, nine other persons known to be subversives who were under warrants of deportation have departed from the United States at their own expense."

as willfully made it impossible for him to depart, by means of an injury to himself or by a destruction of documents obtained by the government, this impossibility, like that in the instant case, would not only be the product of some other offense (*e. g.*, willful destruction of government papers) but also a step in the offense of failing to leave the United States. The single act of failure to make timely application can be an offense in itself and also a part or all of the different offense of complete failure to depart from the United States.

The full context of the statute shows the separate nature of the offenses which it creates. As pointed out by the court below (R. 225), "Section 156 (c) defines four specific, different acts or omissions to act as constituting a crime: (1) willful failure or refusal to depart; (2) willful failure or refusal to make timely application in good faith for necessary travel documents; (3) connivance or conspiracy or any other action, designed to prevent or hamper the alien's departure, or with the purpose of so doing; and (4) willful failure or refusal of the alien to present himself for deportation as required by the Attorney General." All three of the offenses, other than willful failure to depart, are characterized by a capacity for a separate type of injury, *i. e.*, an obstruction or addition of cost to the United States in ridding itself of the undesirable alien, as distinguished from the injury intrinsic in an undesirable alien's continued residence. For example, in the case of the fourth offense, had the Attorney General been successful in obtaining travel documents and had petitioner then

failed to present himself at the proper time, both the injury to the United States and the offense itself could have been an additional and separate matter—petitioner could have been guilty not only of refusal to depart, thereby imposing upon the United States the presence of an undesirable alien, but he could also have subjected the United States to embarrassment and expense in the retracting of arrangements and negotiations with a foreign country and a transportation line for petitioner's going to and entering the foreign country. The offense of failure to depart is penalized because it subjects the United States to the continued presence of an undesirable resident, while the remaining three offenses are separately and additionally penalized because they cause separate and additional types of injury.¹⁴

B. The fact that one offense can also be part of another offense has long been recognized and upheld by this Court. This rule has not been changed by the recent decision in *Prince v. United States*, 352 U. S. 322, under its own stated limitations.¹⁵ The

¹⁴ Petitioner's conclusion that there was error in the instructions to the jury with respect to the relationship of the two offenses here involved (Pet. Br. 24-25) arises from his attention to the single paragraph of instructions which he quotes (Pet. Br. 24) and his overlooking of the prior precise language concerning each offense before the jury, at R. 164, 166. And see the remainder of the instruction at R. 168, from which petitioner quotes only a part.

¹⁵ "[W]e are dealing with a unique statute of limited purpose and an inconclusive legislative history. It can and should be differentiated from similar problems in this general field raised under other statutes. The question of interpretation is a narrow one, and our decision should be correspondingly narrow." 352 U. S. at 325. And see 352 U. S. at 327-329.

decisions of this Court have held in essence, whether expressly articulated or merely implicit in the holding, that a separate punishment is established and is constitutionally permissible where each offense is penalized because of its causation of a different injury or evil. And this principle has been applied no matter how closely the offenses are related. The principle is most clearly illustrated in *United States v. Michener*, 331 U. S. 789 (summarily sustaining sentences for (1) causing a plate adapted for counterfeiting to be made, and (2) possession of that plate with intent to use it for counterfeiting) and in *Albrecht v. United States*, 273 U. S. 1 (sustaining convictions for possession of liquor—one step in the transaction—and sale—the completed transaction).¹⁶ The separate nature of closely related offenses has been upheld in prosecutions for insulting a public official and for disorderly conduct involved in the same incident (*Gavieres v. United States*, 220 U. S. 338); for making a single sale of narcotics in violation of the order form and original stamped package provisions of the Harrison Act (*Blockburger v. United States*, 284 U. S. 299, 303-304); for conspiring to commit an offense and for committing the offense, even though the substan-

¹⁶ In *King v. United States*, 280 U. S. 521, this Court affirmed, *per curiam*, on the authority of the *Albrecht* case, a decision of the Circuit Court of Appeals for the Ninth Circuit (31 F. 2d 17) holding that a conviction of the offense of selling morphine not in or from the original stamped package is not a bar to a subsequent prosecution for the offense of shipping morphine in interstate commerce, without having registered or paid the special tax; even though the same morphine was involved in the two cases—the two offenses being perfectly distinct as a matter of law.

tive offense may be the overt act of the conspiracy (*Carter v. McClaughry*, 183 U. S. 365, 394-395; *Pinkerton v. United States*, 328 U. S. 640, 643-644); for conduct unbecoming an officer and for conspiracy to defraud and the causing of fraudulent claims to be made, "although to be guilty of the latter involves being guilty of the former" (*Carter v. McClaughry*, 183 U. S. 365, 395); for agreeing to receive proscribed compensation and for receiving such compensation (*Burton v. United States*, 202 U. S. 344, 377-378); for breaking into a post office with intent to commit larceny and for committing larceny at the post office (*Morgan v. Devine*, 237 U. S. 632); for homicide, where the accused had been convicted of assault and battery before the death of the injured person (*Diaz v. United States*, 223 U. S. 442, 448-449); for making a false entry in the books of a bank, showing a credit, and later making a false entry in a report of the condition of the bank showing the same credit (*United States v. Adams*, 281 U. S. 202, 204-205). More recently, this Court stated in *Korematsu v. United States*, 323 U. S. 214, 222, that wartime administrative orders, concerning residents of Japanese descent, constituting "separate steps in a complete evacuation program," established separate duties and that disobedience of any one order would constitute a separate offense. And in *American Tobacco Co. v. United States*, 328 U. S. 781, 788, the Court held that conspiracy in restraint of trade was an offense separate from a conspiracy to monopolize under Sections 1 and 2 of the Sherman Act.

In *Prince*, where the crime of entry could be committed by "walking through an open, public door [of a bank] during normal business hours," 352 U. S. at 328), the mere entry, if the robbery itself was completed, added nothing of injury. This factor distinguishes that case from the instant one where, as we have shown, the offense of failing to apply for travel documents could subject the government to the need of taking the laboring oar as to documents, irrespective of the further separate injury of an undesirable alien's continuance in residence in the United States. The failure to seek the documents would accordingly add another element of injury, which the Congress has here specifically subjected to additional penalty.

Petitioner's misconception of the nature and objective of requiring the alien to obtain the travel documents leads him into the further error of arguing that he should have been permitted, at the trial, to explore the government's efforts to obtain travel documents (Pet. Br. 34). The efforts imposed upon the government by petitioner's total do-nothing attitude were of no avail in excusing his failure to act, for, as properly pointed out by the trial judge, the statute imposed the duty to seek the documents upon the alien, and not upon the government (*supra*, pp. 2-3, 27). Even had there been a total failure of the government to obtain travel documents—obviously not the case here (*supra*, p. 9 and fn. 3, and p. 30, fn. 11)—that would still have constituted no excuse for petitioner's failure to act, for the legislative history disclosed instance after

instance where aliens were successful in obtaining entrance to countries which would not heed the applications of the United States government for documents (*supra*, pp. 35-36).¹⁷

V.

THE TRIAL COURT CLEARLY CONSIDERED THE POSSIBILITY OF SUSPENSION OF SENTENCE, AND DID NOT ABUSE ITS DISCRETION IN IMPOSING SENTENCE ON ONE COUNT WITHOUT SUSPENSION

Petitioner's final contention, that the court's sentence was "in disregard of the statutory standards" of the suspension provisions and violated the statute's "policy" of mercy (Pet. Br. 17, 36-38), is not valid on the facts of the case. The statute's proviso (*supra*, pp. 3-4) that the judge "may" suspend sentence imposes no mandate to suspend. Moreover, the judge was aware of the available discretion, for he suspended imposition of sentence on one of the counts (R. 180). The discussion at the time of sentence discloses a clear basis for the judge's refusal to suspend sentence on the other count, a discussion especially pertinent to the portion of the statute establishing the fourth criterion of suspension, *i. e.*,

"Petitioner's initial argument that the evidence does not show a failure to apply for travel documents (Pet. Br. 21-23) rests upon the basic misconception that he was free not to make any efforts, apart from those made by the government, to obtain travel documents. Since petitioner made no such efforts at all, he cannot properly urge (as he does) that he was convicted because he obtained the wrong papers or failed to try to obtain the correct documents. On the evidence believed by the jury, this is a case of total disregard of the alien's obligations, not a case of sincere but misguided efforts.

(4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States;

The judge pointed out the following (R. 174-176):

[A]t one time this defendant had offered to him—this Court offered this defendant after he was indicted the opportunity to leave the country. He was then a citizen of Canada, and he could have gone to Canada at that time. But he refused that permission of the Court, and he just insisted upon staying.

He has been in this country for all these years; he never became a citizen. While he was in this country he left, according to the record in this case, according to the deportation proceedings, he went back to Russia, he was over there for about three years, learning all he could about Communism; and then he came back here as one of their agents. He came back here without a passport. He left the country, and he came back and came in and went out without passports.

He is the editor of a paper. He is an intelligent man. He knew what he was doing. * * *

* * * I feel that he has simply defied the law—he has set himself up above the law. He just made up his mind that he was a little higher than the law of this country, and that he didn't have to obey it. Well, he is going to obey the law.

Considering that Congress permitted a maximum penalty of ten years for the offense, the court's im-

position of a five-year sentence, on the basis of the considerations discussed, is not reviewable. It is far short of a sentence "so severe and the offense so trivial that an appellate court should set it aside" (*Kawakita v. United States*, 343 U. S. 717, 745).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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OCTOBER 1957.